1986

Eddie Clarence Ebbert v. Barbara Ann Ebbert : Reply Brief

Utah Court of Appeals

James P. Cowley; William H. Christensen; Watkiss & Campbell; attorney for respondent.
Lowell V. Summerhays, Kenn M. Hanson; attorneys for appellant.

UTAH COURT OF APPEALS

STATE OF UTAH

SALT LAKE CITY, UTAH

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EDDIE CLARENCE EBBERT, Plaintiff and Appellant, v. BARBARA ANN EBBERT, Defendant and Respondent.	REPLY BRIEF OF APPELLANT No. 860229-CA

* * * * * * * *

On Appeal from the Third Judicial District Court
For Salt Lake County, State of Utah
The Honorable Philip R. Fishler

* * * * * * * *

Argument Priority Classification: 7 (Child Custody)

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LOWELL V. SUMMERHAYS (3154)
LAW OFFICES OF LOWELL V. SUMMERHAYS
Attorney for Plaintiff and Appellant
Post Office Box 1355
4609 South State Street
Sandy, Utah 84091-1355
Telephone: (801) 942-8008

KENN M. HANSON (1355)
Attorney of record for Plaintiff and Appellant at trial
5085 So. State Street
Salt Lake City, Utah 84107
Telephone: (801) 268-3994

JAMES P. COWLEY (0739)
WILLIAM H. CHRISTENSEN (4810)
WATKISS & CAMPBELL
Attorneys for Defendant and Respondent
310 South Main Street
12th Floor
Salt Lake City, Utah 84101
Telephone: (801) 363-3300

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Salt Lake City, Utah 84107
Telephone: (801) 268-3994

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WILLIAM H. CHRISTENSEN (4810)
WATKISS & CAMPBELL
Attorneys for Defendant and Respondent
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12th Floor
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Telephone: (801) 363-3300

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LAW OFFICES OF LOWELL V. SUMMERHAYS
Attorney for Plaintiff and Appellant
Post Office Box 1355
4609 South State Street
Sandy, Utah 84091-1355
Telephone: (801) 942-8008

KENN M. HANSON (1355)
Attorney of record for Plaintiff and
Appellant at trial
5085 South State Street
Salt Lake City, Utah 84107
Telephone: (801) 268-3994

IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

Pursuant to Rule 24 of the Rules of the Utah Court of Appeals, Plaintiff/Appellant herein elects to file the within reply brief.

PRELIMINARY STATEMENT

The Defendant has misstated the issues presented for review. Nine separate and distinct issues have been raised by Plaintiff for review by the Court of Appeals. Defendant has

improperly attempted to consolidate Plaintiff's issues into four points. In so doing the Defendant has raised three new issues involving abuse of judicial discretion, and Defendant has failed to address the following five (5) issues in their entirety as stated in Defendant's "Issues Presented for Review". (Defendant's Brief at p. 1)

1. The trial court erred in failing to make adequate findings of fact and conclusions of law.

2. The trial court failed to allow Plaintiff the right to present some of his case on the issue of child custody pursuant to U.R.C.P. 15(b).

3. The trial court erred in failing to consider the best interests of the children with respect to Defendant's plans to move the children out of state.

4. The trial court was biased and predisposed to award custody to the Defendant.

5. The trial court erred in its determination of visitation rights.

The issues which were presented by Defendant touched on the four remaining issues brought by Plaintiff. Plaintiff's brief clearly and distinctly identifies eight issues revolving around error as a matter of law.

Defendant properly presented for review only one of nine issues brought before the Court of Appeals by Plaintiff. That was, "is the Plaintiff entitled to attorney's fees in bringing this appeal?" (Defendant's Brief at p. 1)

POINTE I

THE FINDINGS WERE INADEQUATE

The Defendant cites Pennington v. Pennington, 711 P.2d 254 (Utah 1985) in favor of the proposition that the findings were adequate.

In this case we must distinguish between a trial at which child custody was at issue and a hearing in a petition to modify. The Utah Supreme Court pointed out the distinction in Christiansen v. Christiansen, 667 P.2d 592 (Utah 1983), where the Court cited Chandler v. West, Utah 610 P.2d 1299, 1301 (1980), as follows:

> Findings of fact and conclusions of law may not be necessary in the denial of every action to modify a divorce decree, except to state that the change of circumstances does not warrant modification.
>
> Where, as here, however, the modification is granted, the district court should make findings to indicate the reasons why modification was found to be appropriate. The making of formal findings of fact and conclusions of law, whether the motion is granted or denied, materially assists the parties in determining whether there may be a basis for appeal, and if an appeal is taken, significantly assists this court in its review.

The Pennington, supra, case was a denial of a petition for modification, nevertheless, the Utah Supreme Court said at page 3:

> We acknowledge that the findings are meager, and strongly advise respondent's attorney, who drafted them, to take the necessary effort in the future to prepare more specific and substantive findings. We cannot overemphasize the importance of well written

> findings to support modifications of divorce decrees. See Tuckey vs. Tuckey, Utah, 649 P.2d 88 (1982). "One of the reasons for this requirement is to explain the basis for the modification so the aggrieved party can determine whether to challenge it and so the appellate court can properly review it on appeal." Shioji v. Shioji, Utah, 671 P.2d 135, 136 (1983). Conclusory findings give little indication of the trial court's reasons for reaching its result. Such findings may invite unnecessary expensive appeals which in turn delay final resolution of the issues and impede judicial economy.

POINTE II

CUSTODY MUST BE DECIDED IN THE BEST INTERESTS OF THE CHILDREN

Defendant's brief raises the issue that the trial court did not abuse its discretion in awarding custody. It appears that Defendant has ignored Utah statues and case law which require that the custody award must be decided in the best interests of the children. Failure to do so would violate the natural and protected rights of the parents and the children. Stanley v. Illinois, 405 U.S. 645-668 (1972) concludes that:

> ..as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged the state denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

A.
THE ISSUE OF CUSTODY WAS PROPERLY BEFORE THE COURT

Defendant claims that the issue of custody was not properly before the Court. (Defendant's Brief at p. 7-12) The Defendant's brief fails to acknowledge Plaintiff's answer to Counterclaim

wherein he properly placed custody in issue before the Court (R. at p. 25). Defendant's brief holds that Plaintiff is bound by the admissions of his pleadings. (Defendant's Brief at p. 11) Plaintiff maintains that custody was raised as an issue by the pleadings, but even if it were not, the Utah Rules of Civil Procedure 54(c)(1) provides that:

> Every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

See also Owen v. Owen, 734 P.2d 414 (Utah 1986).

Defendant argues that Plaintiff declined the Court's invitation to stop the trial and evaluate the custody issue. (Defendant's Brief at p. 12) Defendant's brief at p. 10 admits that custody was an issue and asserts that:

> ...plaintiff, on advice of counsel, withdrew the custody issue.

Defendant has raised the above cited claims out of context with respect to the court proceedings wherein judicial bias became an issue.

Plaintiff never withdrew custody as an issue. In fact, Plaintiff's counsel did move to amend the pleadings to conform to the evidence in accordance with the provisions of the Utah Rules of Civil Procedure, Rule 15(b). (R. at 619, line 25 and R. at 622, line 7)

Upon conclusion of the trial Plaintiff moved for a new trial, and a hearing upon said motion was held July 1, 1986. Custody was clearly in issue:

Mr. Cowley: I don't think we need to say any more about that subject of child custody. That's been discussed adnauseam. It was at his request we got into this very specific custody thing which we always thought was unnecessary, but he wanted it and sobeit.

(R. at p.359, lines 21-25)

Appended hereto is a chart identifying fourteen (14) of the instances at trial where testimony was heard relating to grounds precedent for the award of custody. Each such instance is charted to show the case law citations and basis upon which custody has been awarded. See Addendum, Exhibit "A".

Rule 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings.

B.

THE CUSTODY ISSUE WAS NOT RESOLVED BY THE PLEADINGS

Defendant's brief raises the issue that the Custody issue was resolved by the pleadings because Plaintiff entered into a Stipulation awarding custody. (Defendant's Brief at p. 10)

Even if the parties had purported to stipulation on the child custody issue, such a stipulation would not be binding upon the Court, and the Court, upon the rejection of such a stipulation would have the right and obligation to allow each party to fully present their case on this issue.

Klein v. Klein, 544 P.2d 472 (Utah 1975) provides:

> Though a stipulation pertaining to matters of divorce, custody and property rights therein is advisory on court and will usually be followed, such a

> stipulation is not necessarily binding on court; it is only a recommendation ...

Plaintiff affirms that a proposed stipulation was presented to the Court but was never signed. After the parties were unable to agree on the terms of said stipulation the Court properly set aside said proposed stipulation in its entirety and ordered that a trial be held. (R. at 205)

Callister v. Callister, 261 P.2d 944 (Utah 1953) holds that:

> ... the law was intended to give the courts power to disregard the stipulations or agreement of the parties in the first instance and enter judgment for such alimony or child support as appears reasonable and to thereafter modify such judgments when change of circumstances justifies it, regardless of attempts of the parties to control the matter by contract.

If the reviewing Court finds that an answer in a divorce proceeding is an admission of facts asserted therein, as asserted in Defendant's brief at p. 11, the Court must also find that Plaintiff's Answer to Defendant's Counterclaim properly raises the issue of custody before the Court.

C.

THE COURT ERRED IN FAILING TO ALLOW PLAINTIFF HIS RIGHT TO AMEND HIS COMPLAINT PURSUANT TO RULE 15(b)

In response to Plaintiff's point that "a new trial should be granted pursuant to U.R.C.P. 15(b) on the issue of child custody because the court tried the issue, but failed to allow the Appellant his right to present his case on that issue, and failed to allow him to amend his pleadings", Defendant has submitted only that Plaintiff was aware of her planned move to

Colorado before trial, and that therefore, Plaintiff should not be allowed to amend the pleadings. (Defendant's Brief at pages 12-13)

Defendant has incorrectly cited Plaintiff's brief at page 13 which discusses Defendant's threats to leave the state and take the children, not knowledge of the planned move:

Q: And what did she tell you?

A: That if I did not give her everything she wanted, she would use her parents' money to take the children so far away I would never see them.

(R. at 578, lines 18-21).

Q: And what were you discussing at that time?

A: The same thing.

Q: And what was said to you at that time?

A: If I did not give her everything she wanted, she would be using her parents' money to make sure that I never saw the children again. And I believe at that point she had mentioned Europe.

Q: Any other conversations of that substance?

A: Not off the top of my head, no. Those stuck pretty well.

(R. at 579, lines 9-18).

Case law demonstrates that Rule 15(b) motions should be granted even after the close of evidence and even after a verdict is rendered. See Karlen v. Ray E. Friedman & Co. Commodities, 668 F.2d 1193 (CA 8th 1982), Brown v. Ward, 438 F.2d 1285 (A 4th, 1970), and General Insurance Company v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976).

D.

THE RECORD REFLECTS JUDICIAL BIAS CONCERNING CUSTODY

Defendant's brief states that:

> "A careful review of the entire record absolutely refutes Mr. Hanson's improper allegation of bias."

(Defendant's Brief at p. 15).

Plaintiff has previously submitted citations from the record, case law, and the supporting Affidavit of Attorney Kenn M. Hanson. Clearly there was question regarding the Court's predisposition to award custody as further reflected in the record of hearing upon Plaintiff's motion for a new trial:

Mr. Summerhays: Mr. Ebbert has counseled at great length with Mr. Hanson and myself about a series of events that took place at the trial regarding child custody, and thus events arose out of misunderstanding on Mr. Ebbert's part. He understood that was going to be an issue at the trial and that it had been handled in a stipulation which was not able to be refined to the point where all parties could agree to it; and then when that was withdrawn, elapsed back to a set of pleadings that apparently in Your Honor's opinion did not put that issue properly before the court for the purposes of the trial.

Then when Mr. Ebbert alluded during the course of the trial to possible bruises and welts resulting from a spanking of the children, there was an instruction to Mr. Ebbert, *as he understood it from the Court*-- and I don't have a transcript, your Honor, and wanted to get one and haven't been able to yet -- but to the best of Mr. Ebbert's recollection, your honor said, "I will give you one chance to retract that statement." Mr. Ebbert interpreted that to mean that perhaps he had somehow offended the court and that he was perhaps in contempt of court.

His statement to counsel was: "I said to myself, Boy, now I've done it. I guess I

> said the wrong thing and perhaps should in fact retract that since the Court has suggested that I do so.
>
> He did counsel with his attorney pursuant to Your Honor's suggestion in that regard, but he didn't come away with the opinion or the impression that he could pursue that line further because he felt that the Court -- it had been explained to him that the court had ruled that issue was really not properly before the Court.
>
> He was confused a little further by the statement of the Court that he could get a child evaluation at that point in time and was leaning towards that direction, but didn't because he thought somehow he would be in contempt of court over that proceeding. And why we're back here today, basically, is to ask Your Honor to allow Mr. Ebbert to change his view on that point and to get a child custody evaluation and allow him to open the record just to the extent of making it clear that he did have his day in Court on the child custody issue, because he does feel very strongly about that.

(R. at 349 lines 2-25 and 350 lines 1-20)

The above quote further addresses in part Defendant's statement that Plaintiff is irresponsible in the submission of the Affidavit of Kenn Hanson. (Defendant's Brief at p. 14) The record further supports Mr. Hanson's Affidavit as the Court sought to explain its action during the hearing on Plaintiff's Motion for a New Trial. (See record at p. 364 lines 3 and 4)

POINTE III

VISITATION RIGHTS MUST BE DECIDED IN THE BEST INTERESTS OF THE CHILDREN

Defendant's Brief raises the issue that the trial court did not abuse its discretion in awarding visitation rights.

Defendant's brief states that Plaintiff's contentions that the trial court should have ordered the Defendant to remain in Utah are without merit. (Defendant's Brief at p. 19) Case law previously cited by Plaintiff in the Appellant brief is clear that it is an abuse of discretion to allow the custodial parent to remove the children out of state, limiting or preventing visitation by the other party. See Tanttila v. Tanttila, 382 P.2d 798 (Colo. 1965). Precedent has further defined considerations which should be observed by the Court in awarding visitation rights in the best interests of the children. See Hale v. Hale, 429 NE 2d 340.

Defendant argues that Plaintiff is capable of traveling to Colorado, and that the Defendant's right to travel should not be impinged. In support thereof Defendant cites Shapiro v. Thompson, 394 U.S. 618 (U.S. 1968). Shapiro, supra, is not applicable to the case at bar but rather addresses the one year welfare residence requirement.

Plaintiff's Appellant brief has demonstrated the incapacity of Plaintiff to exercise his visitation rights because the children live in Colorado. (Plaintiff's Brief at p. 31-32) Frazier v. Frazier, 109 FLA. 164, 147 So. 464 provides that it is the responsibility of the custodial parent to provide the children the opportunity to know the non-custodial parent and to benefit from that parent's love and guidance through adequate visitation.

UCA 30-3-5 specifies that:

> Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child.

Currey v. Currey, 321 P.2d 939 (Utah 1958) held that the:

> ...wife who was awarded custody of the minor children of the parties would be required to retain children in the jurisdiction until further order of court so that husband might enjoy full privileges of visiting and maintaining best possible paternal relationship with them.

Rohr v. Rohr, 709 P.2d 382 (Utah, 1985) provides:

> Reviewing courts have universally held that the paramount concern in child visitation matters is the welfare of the child.

While case law is abundant on the issue that visitation rights must be decided in the best interests of the children, Plaintiff will conclude this reply to Defendant's allegation that Plaintiff's contention is without merit by quoting from Searle v. Searle, 172 P.2d 837 (Colo. 1946) which said that in determining what is for the best welfare of a child:

> ... the court must consider not only food, clothing, shelter, care, education, and environment, but must also bear in mind that every such child is entitled to the love, nurture, advice, and training of both father and mother and to deny to the child all opportunity to know, associate with, love, and be loved by either parent, may be a more serious ill than to refuse it in some part those things which money can buy.

See also Brock v. Brock, 123 Wash. 450, 212 p. 550,551.

POINTE IV

THE TRIAL COURT ABUSED ITS DISCRETION IN THE AWARDS OF CHILD SUPPORT AND ALIMONY

The Defendant alleges in her Brief at p.19 that the

Plaintiff has failed to sustain its burden of proving the trial court abused its Discretion in setting the amount of child support. Contrary to this assertion the Plaintiff has adequately set forth in his brief at pgs. 34-41, how the Court abused its discretion in setting the child support at a total of $650.00 per month along with ordering the Plaintiff to pay for health insurance and life insurance for the benefit of the children.

The Defendant alleges in her brief at p. 19 that the trial court carefully considered the overall situation in setting the support obligations. However, the Findings of Fact read orally by the judge at the conclusion of the trial (Record at 330) reveal that the judge made his award of child support solely upon a formula based on his calculation of the earnings of both parties, and that he failed to take into consideration the relative wealth and standard of living of the parties and the need of the Defendant as is mandated by Utah Code Annotated Section 78-45-7(2) which requires that the Court consider the following factors:

> (a) the standard of living and situation of parties;
> (b) The relative wealth and income of the parties;
> (c) the ability of the obligor to earn;
> (d) the ability of the obligee to earn;
> (e) the need of the obligee;
> (f) the age of the parties;
> (g) the responsibility of the obligor for the support of others.

The Defendant's brief at p. 20 asserts that the evidence at trial showed that the Plaintiff had a net income, after tax earnings, of $24,000.00 per year.

The Plaintiff has set forth a detailed analysis in his brief at p. 37 of how the judge erred in finding that the Plaintiff had net after tax earnings of $24,000.00 per year, and why the preponderance of the evidence showed that the Plaintiff's after tax earnings were much lower. The Defendant's brief at pg. 21 misstates the evidence and the testimony where it states that the Plaintiff had a gross income of $36,490.00 plus a company car. The Plaintiff clearly stated at trial, R. at 531, that the figure of $36,490.00 included an amount which the IRS required the Plaintiff to report as income for the value of the car but which he did not actually receive.

The Plaintiff also showed at trial that he had to pay for his personal use of the car (R. at 531).

The Defendant alleges on p. 20 of her brief that the Plaintiff argues that the Defendant's parents' wealth should be imputed to the Defendant in calculating child support. The Plaintiff does not argue that the wealth of the Defendant's parents should be imputed to the Defendant but instead argues the Defendant's standard of living should be considered and that her income from every source and her total discretionary income be considered as is required by Utah law Jones v. Jones, 700 P.2d 1072 (Utah 1985). The trial court failed to base its decision on these factors.

The cases cited by Defendant, Spector v. Spector, 496 P.2d 864, (Ariz. App. 1972) Dickens v. Dickens, 187 P.2d 91, 94-95 (Cal. App. 1947), and Fine v. Fine, 173 P.2d 355, (Cal. App.

1946) are not Utah cases, and therefore are not controlling. Fine, Supra, is factually different from the instant case and cannot be applied. The Plaintiff asks the Court to consider the expense of visiting with the children and the importance to the children of their continued contact with their father. The amount of child support is unrealistic in light of factors outlined by state statute and case law which must be conidered. The Defendant and the children live at a much higher standard of living than the Plaintiff, even without any employment or support, and they still collect substantial child support, leaving the Plaintiff with no discretionary funds.

The Defendant alleges in her brief at pg. 22 that the Plaintiff's monthly expenses as set forth at trial were inflated. However, the Record reveals that the Plaintiff had substantial expenses which were set forth accurately (R. at 536).

The Defendant also alleges that the cases cited by the Plaintiff in his brief at pages 39 and 40 are irrelevant. An examination of these cases will reveal that they support Plaintiff's position. As in Woodward v. Woodward, 709 P.2d 393 (Utah 1983) the Defendant's real discretionary income is much higher than the Plaintiff's. The Plaintiff argues that as in Graziano v. Graziano, 321 P.2d 931 (Utah 1958) the Plaintiff's support obligation should be based on his ability to pay and the Defendant's need. The Plaintiff's desire to sustain an ongoing relationship with children together with the expenses and scheduling conflicts of so doing should be taken into

consideration along with both parties respective needs and ability. The Defendant's assets and standard of living indicate there is no need for $650.00 per month in child support and in light of the circumstances of this case such an award is inequitable.

POINTE V

THE TRIAL COURT ABUSED ITS DISCRETION IN THE VALUATION AND DISTRIBUTION OF MARITAL ASSETS

The Plaintiff has adequately set forth in his brief at pgs. 41-48 how the Trial Court abused its discretion in its valuation and distribution of the martial assets.

The Defendant alleges on pg. 23 of her brief that the Plaintiff's arithmetic is indecipherable in calculating his claim that the Defendant was awarded 97 percent of the martial estate. In support of the Plaintiff's contention that the Defendant received 97 percent of the marital estate the Plaintiff submits a chart attached as Addendum Exhibit "B".

The Plaintiff has clearly shown in his brief at pgs. 41-48 that the trial court ignored the evidence which was presented to it when it placed values upon the marital assets and failed to apply the law in dividing them.

A.

Household Furnishings

The Plaintiff has clearly shown in its brief at p. 45 how the Trial Court erred in placing a value of $5,000.00 upon the household furnishings in the Defendant's possession which

were awarded to the Defendant.

The Defendant presented an Exhibit at trial (Defenandant's Exhibit 1) which is attached to this Reply Brief as Addendum, Exhibit "C". In that exhibit, paragraph 3, the Defendant herself values these assets at $10,000.00. The Defendant introduced no other evidence as to the value of these assets. The Defendant's statement on page 24 of its brief that the Defendant "never valued the household goods at $10,000.00 is a complete misstatement, as is the Defendant's statement at pg. 24 that "The Findings of Fact (Record 257) Paragraphs 7(c) and (j) are identical to Defendant's Exhibit 1, paragraphs 3 and 10". This is simply not true. The Plaintiff has set forth in its brief at page 45 why the preponderance of the evidence mandated a finding that the furnishings were worth more than $10,000.00.

B.

Clothing

The Plaintiff has clearly shown in his brief at pg. 42 how the Court erred in assigning a zero value to the Defendant's clothing. Contrary to the Defendant's assertion that the Plaintiff presented no evidence on the value of the parties' clothing, the Plaintiff elicited the value of the Defendant's clothing from her through cross-examination. She testified that her clothing was worth $5,000.00 (R. at 101) and whether Plaintiff produced evidence as to the value of his own clothing is irrelevant to the gross failure of the trial court to make is valuation of the Defendant's clothing based upon the evidence presented.

C.

Valuation of Rental Property

The Plaintiff has adequately set forth in his brief at pgs. 43 and 44 that the value of the rental property was substantially overvalued by the Trial Court.

In response to the Plaintiff's claim that the valuation of the rental property did not accurately reflect an existing encumbrance of $25,000.00 to the Defendant's parents, the Defendant cites for the reviewing Court's reference an exhibit which was not presented to the trial court (Defendant's Brief at p. 27). Plaintiff has attached a certified copy of said exhibit as Addundum, Exhibit "D", and concluded that a review of said document would indeed set forth the discrepancy resulting in improper and inadequate Findings of Fact.

The Defendant states in its brief that the Judgment and Decree of Divorce provides that the Plaintiff should receive the property free of all liens except the existing mortgage (Respondent's Brief, p. 27). Yet the Decree states no such thing; it merely provides that the Plaintiff would receive the property free of any claims by the Defendant. It makes no mention of claims or interests of third parties. (R. at 244 & 1. 6)

Contrary to the Defendant's assertion on page 28 of Defendant's Brief that the Defendant assumed the $25,000.00 when she assumed the marital residence, the Decree provides only that the martial residence is subject to a contract balance of

$85,050.00. (R at 246 paragraph 7(a) Nowhere in the findings does the Defendant hold the Plaintiff harmless from this obligation. Although the Defendant may have promised that the Porters would provide a Quit Claim Deed to the Plaintiff, the question arises as to whether this binds the Porters to actually do so. The obvious answer is that it does not. Therefore, the Plaintiff is correct in his assertion that the rental property was shown at trial to be subject to a $25,000.00 lien to the Porters and that the trial court erroneously failed to take this into consideration when it made its valuation of the rental property.

D.

Martial Property and Employee Savings Plan

The Plaintiff has adequately set forth in his brief at pgs. 42, 43, and 44 that the Court undervalued the marital residence awarded to the Defendant and over-valued the Employee Savings Plan awarded to the Plaintiff.

E.

Lack of Candor

The Plaintiff has adequately set forth in its Appellant brief at pgs. 45 and 46 how the Defendant demonstrated a lack of candor. The quotation cited by the Defendant regarding the Plaintiff's lack of candor is out of context and is in regard to the Plaintiff's statements about custody and nothing else. The Trial Court's statement demonstrates Court bias more than it establishes anything regrading the Plaintiff's candor. (R. at p. 363.)

The record demonstrates that the Plaintiff was forthright and the Defendant was not.

F.

Division of the Assets

The Plaintiff has adequately demonstrated that the division of the property was unfair to him. It is indisputable that the Plaintiff contributed financially far more to the marriage than did the Defendant's parents (Plaintiff's brief at pg. 47) This is in direct contradiction to the Trial Court's statement that the overwhelming majority of the parties' assets were contributed by the Defendant's parents. (R. at 329) Even if the bulk of the marital assets were contributed by the Defendant's parents, they are still joint property unless proven to have been intended as a gift for the Respondent alone Workman v. Workman, 652 P.2d 931 (Utah 1982). The Trial Court's presumptions seem to have exluded case law precedent to the distribution of marital assets, and has resulted in a gross inequitable distrubition of property.

POINTE VI

THE SCOPE OF AUTHORITY OF THE APPELLANT COURT SHOULD NOT BE RESTRICTED.

Defendant's preliminary statement has sought to restrict the scope of the authority of the Appellant Court in reviewing the case on appeal.

Berger v. Berger, 713, P.2d, 695 (Utah 1985) held as a standard for review that "...this case is in equity and we are

free to review both the law and the facts, Utah Const. Art VIII Section 9".

The presumption outlined in Defendant's brief citing King v. King, 717 P.2d 715 (Utah 1986) that the reviewing court may afford considerable deference to the judgment of the trial court and treat its findings with a presumption of validity, is based upon the trial court's advantageous position which is given up when

> "... the judgment of the court was not in fact a judicial determination, but was conceived in aggravation and not based on any evidence as the court candidly states. This statement robs the matter of the exercise of sound discretion ... must be and is hereby reversed."

Crites v. Crites, 322 P.2d 1046 (Colo. 1958)

The Utah Supreme Court stated in Jones v. Jones, 700 P.2d 1072 (Utah 1985):

> "...the trial Court must exercise its discretion in accordance with the standards that have been set by this Court."

Currently the Utah Supreme Court is evaluating standards of review needed to protect equal protection and due process. The findings of the current Task Force on Gender Bias in the Utah Judicial System may define a standard of review whereby the "presumption of validity" may be modified. Perhaps the U.S. Supreme Court said it best in Stanley v. Illinois, Supra,

> Procedure by presumption is always cheaper and easier than individual determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in

difference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

POINTE VII

DEFENDANT'S BRIEF HAS MISSTATED THE RECORD

The following chart identifies a number of instances wherein Defendant's brief has misstated or misrepresented the record:

Defendant's Misstatements or Misrepresentation	Cite Defendant's Brief	Factual Statement	Cite Record
Custody with specific visitation.	pgs. 2, 3, 4, 5 7, 8, 10, 11, 12, 15, 16	Custody subject to minimum visitation.	at p. 3
Failure to acknowledge Plaintiff's answer to Defendant's Counterclaim.	pgs. 2, 3, 4, 7 8, 10, 11, 12, 15, 16	Answer to Counter-claim.	at p. 25
Statement that Plaintiff accused Defendant of child abuse.	pgs. 2, 4, 14	Actual statement: "no, that's not what I said and I didn't mean that,	at p. 624 lines 24, 25
Statement that Plaintiff earns approximately $36,500.00 per year.	pg. 3	Defendant testified that Plaintiff's net monthly income the year prior, 1985,was approxi-mately $1,500.00 with bonuses rang-ing in gross amounts between $5,000 -$10,000 annually.	p. 426
Absent from the record is an objection by the Plaintiff concerning judicial bias or a preservation of the "coercion" issue...		See hearing on Motion for New Trial	R. at 349, lines 2-25, and 350 lines 1-20

The Court weighed the Plaintiff's earning ability, the Defendant's earning ability, and the expenses of both parties.	pg. 19	If we take her ability to make $700.00 a month net, and his ability to make $2,000.00 a month net, we come up with $1,350 being half...	R. at 330
Plaintiff improperly identifies his expenses.	pg. 22	Plaintiff properly identified his expenses with supporting documentation.	R. at 536
Defendant misstates the terms of the Contract referred to in Defendant's brief.	pg. 27	See attached Addendum, Exhibit "D"	R. at 554

POINTE VIII

ATTORNEY'S FEES SHOULD BE AWARDED TO THE PLAINTIFF

Utah law provides for the award of attorney's fees upon the basis of reasonableness and need. Defendant's brief at pp. 31 and 32 has imsrepresented the facts of Savage v. Savage, 658, P.2d 1021 (Utah 1983) where Defendant states that Savage, Supra, is not applicable to the case at bar, arguing that a greater income disparity existed in Savage, Supra, which was the basis for said award.

An evaluation of the entire Savage, Supra, case demonstrates proportionately similar facts regarding financial ability, and accordingly Attorney's fees should be awarded to the Plaintiff.

Plaintiff has had to bring this case on appeal in order to clarify the findings of the lower Court and to seek correction of the inequities so imposed. Plaintiff has suffered a great financial hardship in this process and seeks appropriate remedies.

CONCLUSION

For all of the reasons set forth in this reply brief and in the Appellant brief, and in acccordance with the provisions of the 9th and 14th ammendments to the U.S. Constitution extending "due process" and "equal protection" under the laws, the Utah Court of Appeals should direct that:

1. Custody be awarded to the Plaintiff and a new trial be granted on the issues of support and property divisions, or

2. A new trial be granted on all the issues with temporary custody awarded to Plaintiff until such time that a trial may be held.

RESPECTFULLY SUBMITTED, this 23rd day of July, 1987.

LAW OFFICES OF LOWELL V. SUMMERHAYS

Lowell V. Summerhays

DELIVERY CERTIFICATE

I hereby certify that I hand delivered four (4) copies of the foregoing REPLY BRIEF OF APPELLANT, this 27th day of July, 1987 to:

James P. Cowley, Esq.
William H. Christeinsen, Esq.
Attorneys for Defendant-Respondent
WATKISS AND CAMPBELL
310 South Main Street
Suite 1200
Salt lake City, Utah 84101

Addendum

A. Custody Issues Raised at Trial

B. Division of Marital Assets

C. Financial Statement

D. Uniform Real Estate Contract

E. "Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children"

Family Law Quarterly, Volume XVIII
Number 3, Fall 1983

CUSTODY ISSUES RAISED AT TRIAL

BASED UPON	CASE LAW PRECEDENT	ISSUE WAS TRIED
1 Removal of the children from the jurisdiction of the court.	McGonigle v. Mcgonigle 112 Colo. 572; 151 P.2d 978 Miller v. Miller 271 P.2d 411 (Colo. 1954) Quinn v. Quinn 412 So.2d 649 (La. App. 1982) Porter v. Martin 434 N.E.2d 885 (Ind App. 1982) Hale v. Hale 429 N.E.2d 340	R. at 421
2 Use of the children as a club against the other.	[1]Goode v. Goode 415 So.2nd 321 (La.Ct.App. 1982)	R. at 424, 425
3 Willingness of the parent to place the welfare of the children before their desires.	Hutchison v. Hutchison 649 P.2d 38 (Utah, 1982)	R. at 522, 523
4 Desire and ability of the parties to provide personal rather than surrogate care for the children.	[2]Lembach v. Cox 639 P.2d 197	R. at 520, 521
5 Flexible job hours of the parties.	Boals v. Boals 664 P.2d 1191 (Utah 1983) Nilson v. Nilson 652 P.2d 1323 (Utah 1982) Prentice v. Prentice 322 N.W. 2d 880 (S.D. 1982) Meltzer v. Witsberger 445 A.2d 499 (Pa. Super. 1982)	R. at 592
6 Bonding.	Walton v. Coffman 169 P.2d 97 F.L.Q. Article, Volume XVII, Number 3, Fall 1983 (Addendum E)	R. at 568

BASED UPON	CASE LAW PRECEDENT	ISSUE WAS TRIED
7 Desire of the parties to protect the childrens right to know the other party.	Frazier v. Frazier 147 S. 464 (Fla. 1933) Rohr v. Rohr 709 P.2d 382 (Utah 1985)	R. at 575, 576, and 569
8 Emotional condition of the parties.	Pennington v. Pennington 711 P.2d 254 (Utah 1985) Moody v. Moody 715 P.2d 507 (Utah 1985) Morel v. Morel 647 P.2d 605 (Alaska 1982) Hogge v. Hogge 649 P.2d 51 (Utah 1982) Humphreys v. Humphreys 520 P.2d 193 (Utah 1974)	R. at 500, 501, and 562
9 Misleading statements made by a party.	[3] Carpenter v. Carpenter 645 P.2d 476	R. at 421
10 The stability of the parties.	Morel v. Morel 647 P.2d 605 (Alaska 1982) Craig v. McBride 639 P.2d 303 (Alaska 1982) In re. Custody of Pearce 456 A.2d 597 (Pa. Super 1983) Jorgensen v. Jorgensen 599 P.2d 510 (Utah 1979)	R. at 525
11 Help from Grandparents for the children.	Lambauch v. Cox 639 P.2d 197 Eschbach v. Eschbach 56 N.Y.2d 167; 451 NYS 2d 658 (1982)	R. at 336 Ln. 4
12 The ability of the parties to help the children with academic needs.	Michelli v. Lipari 417 P.2d 493 (La.Ct.App. 1982)	R. at 568, 619

BASED UPON	CASE LAW PRECEDENT	ISSUE WAS TRIED
12 The ability of the parties to help the children with academic needs. (cont'd)	[4] Faria v. Faria 38 Conn.Supp. 37, 456 A.2d 1205 (1982)	R. at 336
13 Religious training of the children provided by the parties.	U.C.A., 1953, Section 78-3A-39(12)	R. at 619
14 Willful disobedience of court orders.	[5] Hall v. Hall 439 A.2d 447 (Conn.1982)	R. at 583

1. Criteria for Deciding Child Custody in the Trial and Appellate Court, by Jeff Aktinson, Family Law Quarterly, Volume XVIII, Number 1, Spring 1984.

2. Ibid.

3. Ibid.

4. Ibid.

5. Ibid.

Division of Marital Assets

	Plaintiff's Vaulation	Defendant's Valuation
Marital Residence:		
7389 South 1710 East Salt Lake City, Utah	$150,000.00 *no mortgage*	$129,000.00 85,000.00 $ 43,950.00
Rental Property 7238 South 1710 East Salt Lake City, Utah	$ 73,500.00 FMV 48,000.00 Mortgage Balance 25,000.00 Lien-Porters $ 500.00 Equity	$ 79,000.00 FMV 44,000.00 M. Bal. $ 35,000.00 Equity
Barbara Ebbert's clothing, jewerly	$ 5,000.00	-0-
Household Furnishings in Eddie Ebbert's possession	less than $1,000.00	$ 5,000.00
Household Furnishings in Barbara Ebbert's Possession	$ 31,000.00 aprox.	$ 5,000.00
Eddie Ebbert's vested savings plan	$ 4,019.20	$ 9,466.00
TOTAL VALUE OF ESTATE	$191,519.00	$ 98,416.00
Total Value of Assets Received by Plaintiff	$ 5,019.00 2.6% of total estate	$ 48,538.00 49% of total estate
Total Value of Assests Received by Defendant	$186,000.00 97.1% of total estate	$ 48,950.00 51% of total estate

Financial Statement

Eddie C. Ebbert &

Barbara Ann Ebbert

October 31, 1985

Assets:

D	1. Residence occupied by Barbara Ebbert at 7389 South 1710 East, fair market value $129,000, less contract balance of $85,050	$43,950
D	2. Rental property at 7238 South 1710 East, fair market value $79,000, less mortgage balance of $44,000	35,000
D	3. Pots, pans, appliances, carpets, furniture and utility utensils located in residence occupied by Barbara Ebbert	10,000
D	4. Painting by Salvadore Dali	1,200
P	5. Camera equipment and projector	2,500
D	6. Patio furnishings	500
D	7. Garden implements	250
D	8. Cash on hand with Barbara--approx.	1,500
P	9. Cash on hand with Eddie--est.	1,000
P	10. Eddie Ebbert's vested savings plan with Allied Corporation as of 9/30/85	9,466
P	11. Household furnishings, fixtures, appliances, etc. in possession of Eddie Ebbert, including two book cases -- est.	5,000
D	12. Barbara Ebbert's clothing, personal effects, jewelry, etc.	-0-
P	13. Eddie Ebbert's clothing, personal effects, jewelry, etc.	-0-
		$110,366

Liabilities:

D	1.	Mountain States Telephone -- Barbara	$95
D	2.	Mountain Fuel Supply -- Barbara	30
D	3.	Utah Power & Light -- Barbara	115
D	4.	Salt Lake City Water -- Barbara	110
D	5.	Salt Lake City Sewer -- Barbara & Eddie	143
P	6.	Taxes due on residential property-- Barbara & Eddie	1,200
P	7.	Payable to Linnel McCullem for counseling -- Barbara & Eddie	1,300
D	8.	Note payable to Continental Bank -- Barbara	3,500
D	9.	Account payable to ZCMI -- Barbara	135
D	10.	Account payable to Chalk Garden -- Barbara	2,700
D	11.	Account payable to First Interstate -- Barbara	465
D	12.	Account payable to Weinstocks -- Barbara	260
D	13.	Balance due Rowland Hall -- Barbara & Eddie	2063
D	14.	Account due ZCMI -- Eddie	500
D	15.	Account due Weinstocks -- Eddie	500
D	16.	Account due Sears -- Eddie	4,500
P	17.	Account due Colettes -- Eddie	1,500
D	18.	Account due Arthur Frank -- Eddie	566
D	19.	Account due Master Charge -- Eddie	1,500

20.	Account due Mountain Fuel -- Eddie	22
21.	Utah Power & Light -- Eddie	65
22.	Mountain States Telephone -- Barbara & Eddie	400
23.	American Telephone & Telegraph -- Barbara & Eddie	130
24.	Westminster College -- Eddie	672
25.	Repayable to Eddie's father -- Eddie	1,200
26.	Estimated attorney's fees, both parties	12,500
		$36,171

Total Assets	$110,366
Less Liabilities	(36,171)
Net Worth	$74,195
Less Gifts from Mother & Father of Barbara	$(80,333)
Marital Net Worth	$(6,138)

E OF UTAH)
ITY OF SALT LAKE) SS

HE UNDERSIGNED, CLERK OF THE DISTRICT
IT OF SALT LAKE COUNTY, UTAH, DO HEREBY
IFY THAT THE ANNEXED AND FOREGOING IS
JE AND FULL COPY OF AN ORIGINAL DOCU-
ON FILE IN MY OFFICE AS SUCH CLERK.
NESS MY HAND AND SEAL OF SAID COURT
23 DAY OF Hindley 19 87
ON HINDLEY, CLERK
Edrene Matheson DEPUTY

STATE OF UTAH)
COUNTY OF SALT LAKE) SS

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT

THIS _____ DAY OF _____ 19____

W. STERLING EVANS, CLERK

BY _____ DEPUTY

Addendum, Exhibit "D"

PLAINTIFF'S EXHIBIT 9-P 085-2144

"THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE."

UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 1st day of July, A. D., 19 83 by and between Albert N. Porter and Justine L. Porter hereinafter designated as the Seller, and E. C. Ebbert and Barbara A. Ebbert, his wife, as joint tenants with full rights of survivorship hereinafter designated as the Buyer, of Salt Lake City, Utah

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Salt Lake, State of Utah, to-wit: 7389 So. 1710 East, Salt Lake City (ADDRESS) Utah
More particularly described as follows:

All of Lot 90, WILLOW HILL SUBDIVISION, PHASE iv, amended and extended according to the official plat thereof on file and of record in the Salt Lake County Recorder's Office.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of One Hundred Twenty-Eight Thousand and Nine Hundred ------------ Dollars ($ 128,900.00) payable at the office of Seller, his assigns or order strictly within the following times, to-wit: -0- ($ -0-) cash, the receipt of which is hereby acknowledged, and the balance of $ 128,900.00 shall be paid as follows

In accordance with Exhibit "A" attached hereto and by this reference incorporated herein.

Possession of said premises shall be delivered to buyer on the 1st day of July, 19 83

4. Said monthly payments are to be applied ~~first to the payment of interest and second~~ to the reduction of the principal. Interest shall be charged from date of any delinquency on all unpaid portions of the purchase price at the rate of twelve and ½ per cent (12 ½ %) per annum. The Buyer, at his option at anytime may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of First Interstate Bank of Utah with an unpaid balance of $ 90,000, as of June 1, 1983

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following none

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed twelve and ½ percent (12½ %) per annum and payable in regular monthly installments; ~~provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.~~

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The ~~Buyer~~ Seller agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. ~~[illegible]~~

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property

EXHIBIT "A"

To that certain Uniform Real Estate Contract, dated July 1, 1983, by and between Albert N. Porter and Justine L. Porter as sellers and E. C. Ebbert and Barbara A. Ebbert as buyers.

The buyers shall pay to the sellers the sum of $25,000.00 from the proceeds of the sale of real property owned by the buyers and located at 7238 South 1700 East.

In addition, the buyers shall pay to the sellers the sum of $550.00 on or before the 15th day of July, 1983 and the sum of $550.00 on or before the 15th day of each and every month thereafter until the buyers have paid to the sellers the total principal sum (including the $25,000.00 referred to above) of $128,900.00 (without interest).

At the request and demand of the sellers, made on or before May 26, 1990, the buyers shall pay to the sellers on May 26, 1990 the remaining unpaid balance due and owing hereunder.

Albert N Porter
ALBERT N. PORTER

Justine L. Porter
JUSTINE L. PORTER

E. C. Ebbert
E. C. EBBERT

Barbara A Ebbert
BARBARA A. EBBERT

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND AND SEAL OF SAID COURT

THIS 23 DAY OF July 1987

H DIXON HINDLEY, CLERK

BY Darlene Matheson DEPUTY

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I THE UNDERSIGNED CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND AND SEAL OF SAID COURT

THIS 23 DAY OF July 1987

W STERLING EVANS, CLERK

BY Darlene DEPUTY

Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children

ROBERT F. COCHRAN, JR.*
PAUL C. VITZ†

Recent studies in the field of psychology have shown that parental separation and divorce have substantial negative effects on children. Children whose parents separate commonly suffer from fear, worry, sadness, rejection, anger and guilt at the time of the separation. A surprisingly large number of the children of divorced parents suffer from long-term difficulties with serious depression. Children suffer from the anxiety that they feel at the loss of the presence of a parent on whom they have become dependent, the increase in conflict between parents that often accompanies divorce, and the loss of the socializing influence of the departed parent. The harmful effects of parental separation and divorce lead many children to become involved in various types of antisocial behavior.

The results of the recent studies concerning the effects of parental separation and divorce on childen have significant implications for domestic relations law. Part I of this article examines the psychological literature that shows the impact on children of parental separation and divorce. Part II discusses several means of attempting to protect the interests of the children in a divorce. It will argue (1) that the law should discourage divorce and give parents an opportunity to

*Associate Professor, School of Law, Pepperdine University, Malibu, California; J D , University of Virginia
†Associate Professor of Psychology New York University, Ph D , Stanford University

consider the negative effects of divorce on children by requiring a one-year's separation prior to the granting of a divorce where there are living minor children; (2) that independent legal counsel for the child in contested custody cases is not generally justified, but that judges should have the authority to call on the aid of experts from fields other than law in determining child custody; (3) that the law should protect the child's interest in substantial contact with both parents by approving joint custody where parents are able to agree to joint custody, by granting substantial visitation for children with the noncustodial parent in contested cases, and by setting statutory minimum standards of parental visitation and support which are effective when parents are separated; and (4) that parents should be required to attempt to mediate child custody and visitation disputes for the primary purpose of reducing parental conflict.

I. The Effects of Divorce on a Child

A. *Wallerstein and Kelly's Five-Year Study*

The most extensive, helpful and informative study of the effects of parental separation and divorce on children is that of Judith S. Wallerstein of the School of Social Welfare of the University of California at Berkeley and Joan B. Kelly, a clinical psychologist. The results of that study were published in *Surviving the Breakup: How Children and Parents Cope with Divorce* in 1980.[1] This study is the first to track systematically the effects of divorce on the same families for a period as long as five years.

Wallerstein and Kelly investigated sixty families who voluntarily became involved in family counseling at the Marin County, California Community Mental Health Center at the time the parents were going through a divorce.[2] Families were not included in the study if a child had a history of psychological difficulty, was in psychotherapy, was retarded, or was significantly below developmentally appropriate norms.[3] The families in the study were predominantly middle class.[4]

Wallerstein and Kelly conducted extensive interviews of all of the

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1. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP. HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) [hereinafter cited as WALLERSTEIN].
2. *See id.* at 4.
3. *See id.* at 330.
4. *See id.* at 307.

members of the families at the time of the divorce.[5] They intended to complete the study with another set of interviews one year later, in light of the conventional wisdom which suggests that within one year the families would have adjusted to the divorce.[6] Wallerstein and Kelly found that eighteen months after the separation many children were experiencing great difficulties and were still on a downward course.[7] They decided to extend their study to five years after divorce.[8]

1. THE CHILDREN AT SEPARATION

The authors found that a significant number of the children, because of the separation of their parents, suffered fear, worry, sadness, feelings of rejection, loneliness, anger and guilt.[9] Less than 10 percent of the children felt relieved at the separation.[10] The authors found that "[t]he central event in the divorce from the child's perspective is the physical separation of his parents."[11]

The initial reaction to the divorce of over 90 percent of the children was one of strong fear and anxiety. The parental breakup brought "an acute sense of shock, intense fears, and grieving which the children found overwhelming."[12]

The children worried about who would provide for their needs.[13] A very crucial fear at this time was one of being abandoned.[14] The children "concluded that if the marital tie could dissolve, the parent-child relationship could dissolve also."[15] Half of the children feared being abandoned forever by the parent who had left and one-third

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5. *See id.* at 4.
6. *See id.* at 5.
7. *See id.*
8. *See id.*
9. *See id.* at 45-50.
10. *See id.* at 34.
11. *See id.* at 36.
12. *See id* at 35. The authors state:
    Many burst into tears and pleaded with parents to reconsider. Some prayed for God's help. Sonia, age eight, first vomited, then hugged and kissed her mother, offering a new washing machine or clothes dryer to placate her. Several children asked, "Will I ever see my Daddy again?" A few had delayed reactions. Five-year-old Fred watched TV silently when told of the decision and a few days later began to sob, "We don't have a daddy anymore! I'll need a new daddy!" Several children panicked. Everett, age twelve, ran screaming through the house, "You're trying to kill us all!" *Id.* at 40-41.
13. *See id.* at 45.
14. *See id.* at 46.
15. *Id.* at 45.

had the same fear with regard to the custodial parent.[16] They were preoccupied with the fear of waking to find both parents gone.[17]

Older children, those between the ages of 13 and 18, worried about sex and marriage.[18] Many of them feared marriage and had doubts about their competence as sex partners.[19]

The children worried not only about themselves, but also about their parents.[20] They worried about the ability of the absent parent to care for himself and about the custodial parent's suffering, depression, and physical health.[21]

Wallerstein and Kelly state:

> Two-thirds of the children, especially the younger children, yearned for the absent parent, one-half of these with an intensity which we found profoundly moving.[22]

It did not appear that yearning for the father was rooted merely in a good predivorce relationship,[23] but that it drew its sustenance from the child's developmental needs and fantasies.[24] This yearning was illustrated in the children's play which was observed as a part of the evaluation. The children played house with dolls. The mother and father dolls were always placed in the same house with the children, and generally the father and mother dolls were placed holding one another tightly.[25]

Over one-half of the children in the Wallerstein and Kelly study suffered intensely from feelings of rejection by one or both of their parents.[26] Young children did not distinguish the absent parent's leaving them from his or her leaving the other parent.[27] Many of the boys felt that criticism of the absent father by the mother was directed at them.[28]

The children felt lonely with the father gone and the mother working more. They felt both parents slipping out of their lives.[29] This

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16. *See id* at 46
17. *See id*
18. *See id* at 85
19. *See id* at 86.
20. *See id* at 47.
21. *See id*
22. *Id* at 46.
23. *See id* at 47.
24. *See id*
25. *See id*
26. *See id* at 48.
27. *See id*
28. *See id*
29. *See id*

loneliness was present even in cases where the children had not had gratifying relationships with their fathers while the families were together.[30]

Over one-third of the children in the Wallerstein and Kelly study, especially the boys, showed feelings of anger.[31] There was a rise in aggression on the part of children of all ages. One-fourth of the children expressed this anger explosively toward one or both parents.[32] The children saw divorce as an act of selfishness on the part of their parents and felt that the parents had given primary consideration to their own needs.[33]

The authors found that one-third of the children assumed some significant amount of the blame for the breakup of the home and that young children up to the age of eight were more likely than older children to feel responsible for the separation of the parents.[34]

Wallerstein and Kelly expected to find in the children a sense of relief at the marital separation in direct proportion to the amount of marital discord.[35] This was not the case. They found that only where the father had been violent and this violence had frightened a younger child was there a sense of relief;[36] otherwise, the reaction to the divorce was not linked to the quality of the relationship with the departed parent.[37]

In summary, Wallerstein and Kelly found that following the separation of parents, almost all of the children studied suffered from fear and worry and that significant numbers of the children suffered from feelings of sadness, rejection, anger and guilt.[38]

2. VISITATION

Within the great majority of the families studied by Wallerstein and Kelly the children resided with the mother and the father had visitation rights.[39] This is the case in over 80 percent of post-divorce families.[40] Visitation rights of the noncustodial parents with the children

30. *See id.* at 49.
31. *See id.* at 50
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.* at 53.
36. *See id.*
37. *See id.*
38. *See id.* at 45-50.
39. *See id.* at 121.
40. *See id.*

of the Wallerstein and Kelly study were typically ordered by judicial decree or established at the suggestion of the attorneys.[41] Generally the children were given twice-monthly overnight or weekend visits with the noncustodial parent.[42]

The exercise of visitation rights by the noncustodial parent varied substantially. Almost 20 percent of the Wallerstein and Kelly children saw the noncustodial parent two or three times a week.[43] Other children seldom, if ever, saw the noncustodial parent.[44] One-fourth of the children in the study were visited infrequently and erratically.[45] It must be remembered that these were the children of parents both of whom had volunteered to be involved in post-divorce counseling. It is reasonable to assume that other noncustodial parents as a group would probably be less inclined to seek and exercise visitation rights.

Visitation is a difficult time for separated parents. They will generally have some contact with one another. They are reminded of the good times that they miss and of the bad times that give rise to old feelings of hostility. Wallerstein and Kelly found that, during the first year, two-thirds of the mothers and four-fifths of the fathers felt stress from the visits.[46] One-fifth of the mothers saw no value in the visits, and actively tried to sabotage them.[47] One-third of the children, most often the older children, were consistently exposed to intense anger at the time of the visits.[48]

The study showed that depressed fathers and guilty fathers avoided visitation.[49] The depressed fathers, generally those who had been rejected by their wives, "were preoccupied with their own shame, grief and lowered self-esteem."[50] Some fathers who felt guilty for having ended the marriage avoided visitation because the contact with their children reminded them of their guilt.[51] At times, such fathers would start a flurry of guilt-ridden visitations, which was rarely sustained.[52]

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41. *See id.* at 132-133.
42. *See id.* at 132.
43. *See id.* at 135.
44. *See id.* at 137.
45. *See id.* at 136.
46. *See id.* at 125.
47. *See id.*
48. *See id.*
49. *See id.* at 127.
50. *Id.*
51. *See id.* at 128.
52. *See id.*

Other fathers used visitation as a weapon against the mother and exercised visitation only for so long as the visits seemed to harass the mother.[53]

Children do not understand the complicated psychological forces within parents that lead to infrequent or erratic visitation. A lack of visitation reinforces any feelings a child may have that he or she is to blame for the divorce. Visitation is seen by the children as a reflection of the noncustodial parent's love for them, and a lack of visitation as his rejection of them.

Wallerstein and Kelly state that "children expressed the wish for increased contact with their fathers with a startling and moving intensity. . . . Complaints about insufficiency of parental visits were heard not just from those youngsters who rarely saw the absent parent, but from many who were being visited rather frequently as well."[54] The authors found that "[t]he intense longing for greater contact persisted undiminished over many years. . . ."[55] Although 40 percent of the children saw the noncustodial parent at least once a week and almost half of those saw him two or three times weekly,[56] only 20 percent of all the children were reasonably content with their visiting situations.[57] Not only did the children desire more visitation, but "boys and girls of various ages who had been doing poorly at the initial assessment were able to improve significantly with increased visiting by the father."[58]

3 THE CHILDREN FIVE YEARS AFTER THE SEPARATION

Wallerstein and Kelly did their final evaluations of the children five years after the divorce. At that point, 34 percent of the children were coping quite well and had high self-esteem.[59] For these children the divorce might have been a sad event, but it did not continue to make them aggrieved or angry at either parent. These children generally benefited from having stable, loving relationships with both parents after the divorce.[60] Regular, frequent visitation with the noncustodial

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53 *See id* at 129
54 *Id* at 134
55 *Id*
56 *See id* at 135
57 *See id* at 143
58 *Id* at 219
59 *See id* at 209
60 *See id* at 215.

parent was found to be a key factor contributing to the success of the children within this group, especially among the youngest children.[61]

A second group of children in the study were classified in the middle range of psychological health as doing reasonably well.[62] This intermediate category included 29 percent of the children.[63] Though classified as doing reasonably well, those within this middle range "continued to show significant residues of their continuing anger in their persistent emotional neediness, unhappiness and somewhat diminished self-esteem."[64]

The most surprising and disturbing finding of the Wallerstein and Kelly study was that five years after the divorce, children within the third group, consisting of over one-third of the children, were "consciously and intensely unhappy and dissatisfied with their life in the post-divorce family."[65] Thirty-seven percent of the children were classified as "moderately to severely depressed."[66] Unhappiness was actually greater at five years than it had been at one-and-a-half years after the divorce.[67] The following description of the play of an eleven-year-old member of this group is illustrative:

> As Barbara entered the playroom, she busied herself with a dollhouse and began to construct a fantasy story which could have been a childish rendition of *Waiting for Godot*. She arranged the family dolls around the dinner table, which was set with careful attention to detail. The dolls in all their finery sat quietly awaiting the imminent arrival of the daddy doll who never appeared. It soon became clear that "waiting for daddy" was a central fantasy which was repeated endlessly as if frozen in time.[68]

The findings of the Wallerstein and Kelly study are especially disturbing when we take into consideration the following statement of the authors:

> [T]he children within our study probably emerged at least somewhat or perhaps considerably better than a comparable group of children from nonstudied divorcing families by virtue of our limited intervention; the fact that we attracted parents with some continuing commitment to their children to participate in the study in the first place; and that the children were a relatively sturdy group of youngsters in that they had not been referred for psychological treatment at any time in their lives and had achieved age-appropriate learning and behavior

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61. *See id.* at 219.
62. *See id.* at 213.
63. *See id.*
64. *Id.* at 213.
65. *Id.* at 211.
66. *Id.*
67. *See id.*
68. *Id.*

within the school, despite their experiences and unhappiness within the failing and conflicted marriages. They were, moreover, drawn from a predominantly white, middle-class population and had been relatively protected from economic and social privation. It may well be that there would be considerably greater emotional decline among children in a general population.[69]

B. *John Bowlby: Attachment, Separation, Anxiety, and Anger*

The findings of Wallerstein and Kelly provide substantial support in the parental separation and divorce setting for the theories and extensive clinical observations of the English psychiatrist-psychoanalyst, John Bowlby. Bowlby's three volumes, *Attachment*,[70] *Separation: Anxiety and Anger*,[71] and *Loss: Sadness and Depression*,[72] powerfully document the damaging effects on a child of his separation from a person who has regularly engaged in social interaction with and responded to him and to whom he has become attached.[73] A child will turn to such a person for comfort when he is hungry, tired, ill, or alarmed.

During the first year of life, a child develops an attachment with the person who engages in social interaction with him most often. Generally this will be his mother. By the second year of life the great majority of children have other attachment figures, including the father, but will continue to maintain a principal attachment with the mother.[74] Unless a child is less than a year old, the separation of his parents therefore will generally result in his separation from an attachment figure.

Bowlby identifies three stages that arise from a child's separation from an attachment figure. The first phase is protest and is characterized by extreme and voiced anxiety over separation.[75] The child seeks by all means available to recover the person to whom he was attached.[76]

The next stage, despair, occurs sometime after the separation. The

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69. *Id.* at 307.

70. J. BOWLBY, ATTACHMENT (1969) [hereinafter cited as ATTACHMENT].

71. J. BOWLBY, SEPARATION: ANXIETY AND ANGER (1973) [hereinafter cited as SEPARATION].

72. J. BOWLBY, LOSS: SADNESS AND DEPRESSION (1980).

73. Bowlby refers to such an attachment figure as "mother" or "mother figure," but makes it clear that this person may or may not be the child's natural mother. *See* ATTACHMENT, *supra* note 70, at 303-4.

74. *See id.* at 304-6.

75. *See id.* at 27.

76. *See* SEPARATION, *supra* note 71, at 26.

child is preoccupied with the attachment figure and is vigilant for his or her return;[77] however, the child's behavior suggests increasing hopelessness.[78] "He is withdrawn and inactive, makes no demands on people in the environment, and appears to be in a deep state of mourning."[79]

The last stage is detachment. If the attachment figure returns at this stage, the child may seem remote and apathetic. There is a listless turning away.[80] Through detachment the child learns to defend himself against the pain of separation.

As Bowlby observes, Freud late in his career came to the conclusion that the primal anxiety in a child's life is not related to sex but results from the loss of a loved one. Freud said that "[m]issing someone who is loved and longed for is the key to an understanding of anxiety."[81]

Bowlby finds that an often-documented response to the loss of one to whom a child is attached is anxious attachment. A child will cling to another attachment figure[82] or to the departed person when he or she returns.[83] Though frequently labeled overdependency, Bowlby notes that it is actually a response by the child to the lack of confi-

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77 *See id*

78 *See* ATTACHMENT, *supra* note 70, at 27

79 *Id*

80 *See id* at 28

81 S FREUD, INHIBITIONS, SYMPTOMS AND ANXIETY (1926), quoted in SEPARATION, *supra* note 71, at 27

82 SEPARATION, *supra* note 71, at 211 13 Bowlby points to the following illustration in which the investigator has just asked a mother whose husband deserted her and their four year-old daughter three months before, whether her daughter sometimes wants to be cuddled

> Yes all the time just lately—only since he left (What do you do?) Well, if I'm not busy I sit down and nurse her, because--you know—she's continually clinging round me, she keeps saying, 'Do you love me? You won't leave me, Mummy, will you?'—and so I sit down and try to talk to her about it you know, but I mean at her age (about four), really you can't explain And she used to dress herself, but since my husband's been gone, she's relied on me for— well every mortal thing I've had to do for her At the moment I'm more or less letting her do what she wants I mean she s been upset in one way, and I don't want to upset her again Because I did put her in a nursery just after he went because I thought it might take her mind off things, you see but anyhow the matron asked if I would mind taking her away because she said she just sat and cried all day long I think she's got it into her head that because her Daddy's gone, and me taking her there and leaving her all day, she perhaps thought I d left her too you see So she was only there a fortnight, and then I took her away But she's afraid of being left on her own I mean, if I go to the toilet, I have to take her with me, she won't even stay in the room on her own She's frightened of being left J NEWSON & E NEWSON FOUR YEARS OLD IN AN URBAN COMMUNITY (1968) quoted in *id* at 214

83 *Id* at 26-27

dence that the attachment figure who is present will be accessible and responsive to him.[84]

Other factors contribute to this anxious attachment. The most influential are threats made by a parent to abandon the child and parental quarrels. As Bowlby writes, the threats to abandon the child "have the tremendous power they do have because for a young child separation is itself such a distressing and frightening experience or prospect."[85] Bowlby observes further:

> When parents quarrel seriously a risk that one or other will desert is always there . .
>
> . .[W]hen a child is threatened with being abandoned by his parents, either as a disciplinary measure, or because of marital discord, the effects on him of any actual separation will not only be magnified but be likely to persist [86]

When parents separate, children are subject not only to the loss of the absent parent, but, as Wallerstein and Kelly found, to substantial fears that they will lose the other parent as well.[87]

Bowlby also notes that anger is a frequent and very basic response to separation, a link which is illustrated in Wallerstein and Kelly's study.[88] This anger is sometimes directed toward the person who has left and sometimes is displaced to other targets. Angry behavior may be a reproach to the departed attachment figure, a reaction of despair, an attempt to overcome obstacles to reunion, or an attempt to discourage the loved person from going away again.[89] Anger at separation may also become revengeful.[90]

The combination of anxious attachment and anger that a child

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84 *Id* at 212-13

85 SEPARATION, *supra* note 71, at 215

86 *Id* at 235

87 *See* WALLERSTEIN, *supra* note 1, at 45-46 *See also* text *supra* accompanying notes 13 through 17

88 *See id* at 50 *See also* text *supra* accompanying notes 31 through 33

89 *See* SEPARATION, *supra* note 71, at 246-47

90 *See id* at 249 Bowlby, citing others who have recognized the link between separation and anger, gives some graphic examples of extreme anger

> [I]n an early paper that calls attention to the traumatic effects of separation, Kestenberg (1943) describes a girl of thirteen who had been deserted by her parents and who had been cared for by a succession of other people She trusted no one and responded to any disappointment by some vengeful action During the course of treatment this girl pictured herself as grown up and so able to revenge herself on her mother by killing her Many analysts who have treated patients with this type of background could give similar examples
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> In [a] paper that relates anger to separation, Burnham (1965) makes brief reference to two patients who actually engaged in matricide One an adolescent who murdered his mother, exclaimed afterwards, "I couldn't stand to have her leave me "

feels toward the departed attachment figure causes painful conflicts within the child. Bowlby notes:

> [Anxious and angry behavior is] directed toward the attachment figure: anxious attachment is to retain maximum accessibility to the attachment figure; anger is both a reproach at what has happened and a deterrent against its happening again. Thus, love, anxiety, and anger, and sometimes hatred, come to be aroused by one and the same person. As a result painful conflicts are inevitable.[91]

In contrast to the child who is anxious about the accessibility and responsiveness of his attachment figures, the child who is confident about the accessibility and support of attachment figures can build a stable and self-reliant personality.[92] Bowlby examines the evidence that secure relationships with attachment figures lead to a growth in self-reliance.[93] He concludes:

> [J]ust as we found that there is a strong case for believing that gnawing uncertainty about the accessibility and responsiveness of attachment figures is a principal condition for the development of unstable and anxious personality so is there a strong case for believing that an unthinking confidence in the unfailing accessibility and support of attachment figures is the bedrock on which stable and self-reliant personality is built.[94]

C. *The Effect of Conflict within Families*

Some recent studies have indicated that the conflict between parents, especially conflict after their separation, is psychologically destructive to children.

A study by E. Mavis Hetherington examined seventy-two children of divorce during the two years following separation and seventy-two children of intact nuclear families.[95] The problem behaviors and the

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Another, a youth who placed a bomb in his mother's luggage as she boarded an airliner, explained, "I decided that she would never leave me again." The hypothesis proposed here [that separation anxiety arouses intense anger] makes these statements less paradoxical than they appear *Id* at 250-51, citing Kestenberg *Separation from Parents*, 3 NERV. CHILD 20-35 (1943), and Burnham, *Separation Anxiety*, 13 ARCHS. GEN. PSYCHIAT. 346-58 (1965)

91. SEPARATION, *supra* note 71, at 253.

92. *See id* at 322.

93 *See id* at 322-59 One study cited by Bowlby is that of Megargee, Parker, and Levine of 488 university students that measured socialization with the California Personality Inventory. Socialization was found to correlate positively with those students living with both natural parents and negatively with those students whose parents were divorced. *See* Megargee, Parker & Levine, *Relationship of Familial and Social Factors to Socialization in Middle-Class College Students*, 77 J. ABNORM. PSYCHOL. 76 (1971), cited in *id.* at 339.

94. *Id* at 322.

95. Hetherington, *Family Interaction and the Social, Emotional and Cognitive Development of Children After Divorce*, THE FAMILY. SETTING PRIORITIES 71 (V. Vaughn and T. Brazelton eds. 1979).

positive behaviors of the children were studied through extensive interviews of parents and teachers and observations of the children at home and at school, two months, one year, and two years following divorce.[96]

During all of the measurement periods, the children from the intact nuclear families in which there was low or moderate conflict were doing the best.[97] The problems of children of intact nuclear families in which there was "intense continuing marital dissatisfaction and conflict,"[98] as compared with the children of divorced single-parent families, varied with time. The author states:

> In the first year following divorce, children in the divorced families were functioning less well than those in the high-discord nuclear families. . . . In this period, children from divorced families were more oppositional, aggressive, lacking in self-control, distractible, and demanding of help and attention in both the home and school than were children in families with high rates of marital discord. . . .
>
> By the end of two years following a divorce, the pattern of differences between children from stressed nuclear and divorced families was reversed. . . .[99]

The study found that the children of divorced families in which there was high conflict after the divorce showed greater problems than any of the other children in the study at all three times that the children were evaluated.[100] The only exception was that girls in high-conflict divorced families and girls in high-conflict nuclear families were experiencing the same high level of difficulty two years after divorce.[101]

Doris S. Jacobson's study of fifty-one children whose parents had been separated within a year prior to the study examined the impact on children of interparent hostility after separation.[102] The results of two tests were used and compared. One test measured the occurrence of incidents of interparent hostility and the other measured the children's poor social adjustment behavior, such as aggression, hyperactivity, social withdrawal, fear, and inhibition. The study found that interparent hostility after separation is destructive to children, and

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96. *See id.* at 73.
97. *See id* at 74.
98. *Id.*
99. *Id.*
100. *See id.* at 76.
101. *See id*
102. *See* Jacobson, *The Impact of Marital Separation/Divorce on Children II. Interparent Hostility and Child Adjustment*, 2 J. DIVORCE 3 (1978).

that "the greater the amount of interparent hostility, the greater the maladjustment of the child."[103]

The findings concerning the damage caused to children when there is conflict between their parents after separation is particularly disturbing when coupled with the finding of Wallerstein and Kelly, as noted by Hetherington, "that bitterness and conflict between divorcing parents escalated rather than diminished following separation."[104]

D. *Social Adjustment and a "Whole Home": The Importance of the Father*

The separation from a parent is for a child a traumatic experience, which of itself has severe and long-lasting detrimental effects on a child's psychological well-being. A child also suffers in his other social adjustment when he is not raised in what Margaret Mead has called a "whole home,"[105] that is, a home in which a father and a mother are present. She has said:

> One of the most important learnings for every human child is how to be a full member of its own sex and at the same time fully relate to the opposite sex. This is not an easy learning, it requires the continuing presence of a father and a mother to give it reality. . . . [A child] must watch both parents meet its springing impulse, watch both parents discipline and mould their own impulses so that the child is protected and at adolescence be set free by both parents to go out into the world.[106]

The great importance of the father in the development and education of his children—sons and daughters—is one of the best documented findings within the social sciences in the last twenty years. The studies in this area give a clearer understanding of the pathologies found in children of divorce.

Psychologists and others have found that the father makes major contributions to a child's development, especially of its individual identity. He helps the child to separate psychologically from the mother; teaches it to control its impulses and to learn and respond to the laws, rules, and structures of the society; and serves as a buffer for the mother's attention and emotions (both affection and anger) that

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103. *Id* at 17
104. Hetherington, *supra* note 95 at 76, citing WALLERSTEIN, *supra* note 1.
105. M. MEAD, MALE AND FEMALE 359 (1949).
106. *Id.*

may be heavily focused on the child. Thus, the father offers the child another reference point and a haven, and enables the child to avoid being overwhelmed by the mother. Also, by providing the mother with an adult to whom she can relate, the father helps to keep the mother from becoming overly involved with the children.[107]

The studies have indicated that the detrimental effects of a father's absence on sons are somewhat different from those on daughters. Some of the regularly reported effects of father absence on sons are high aggressive behavior, strong preference for immediate gratification, lack of social responsibility, intellectual deficits (among them a lower IQ by an average of seven points), low need for achievement, high delinquency potential, tendencies toward homosexuality, lack of trust in other males, and low self-esteem.[108]

The regularly reported effects of father absence on girls are increased promiscuity (an increase often interpreted as a kind of search for the absent father and a general anxiety about male evaluation of self-worth), lack of independence, lowered cognitive capacity, and lack of impulse control.[109]

The importance of the father to children was recognized by Wallerstein and Kelly. They observed:

> The children who felt rejected by the father were burdened in their psychological functioning despite the presence of a good mother. . . . [T]he child continued to be aware of himself in regard to both parents and the two-parent perspective remained significant despite legal and geographical separation and the passage of years. . . .
>
> [G]ood father-child relationships appeared linked to high self-esteem and the absence of depression in children of both sexes and at all ages. We were interested to find this significant link in both sexes up to and including those in the thirteen-to-twenty-four age group. . . .
>
> [T]he importance of a good father-child relationship does not diminish in the divorced family for boys or girls and may, in fact, increase as the child approaches early adolescence. This finding carries social implications, especially since it is also our finding that older children do not attach readily to stepfathers and that older children often resented the stepfather's presence in the family.[110]

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107. *See e.g.* FATHERS OBSERVATIONS AND REFLECTIONS (S. Cath, A Gurwitt and J. Ross eds 1982); Ross, *Fathers in Development*, PARENTHOOD AS AN ADULT EXPERIENCE (R. Cohen, B. Confer, S. Weissman, eds 1982) (in press); Hetherington, *Children and Divorce*, PARENT-CHILD INTERACTION: THEORY, RESEARCH, AND PROSPECT 33 (R. Henderson ed. 1980).

108. *See e.g.* H. BILLER, FATHER, CHILD AND SEX ROLE (1971); J. CORTÉS, DELINQUENCY AND CRIME: A BIOPSYCHOSOCIAL APPROACH (1972).

109. *See also* Hetherington, *Effects of Father Absence on Personality Development in Adolescent Daughters*, DEVELOPMENTAL PSYCHOLOGY 313 (1972).

110. WALLERSTEIN, *supra* note 1, at 218-20.

E. *The Social Costs of Parental Separation and Divorce*

The relation of fatherless families to delinquency connects divorce with painful costs not just to the family itself, but to society in general. For example, Wallerstein and Kelly mention that in their sample of the 37 percent of the children who were classified as seriously unhappy and depressed five years following divorce, they found many types of delinquency. Among them were sexual promiscuity, drug abuse, petty stealing, some alcoholism, and breaking and entering.[111] The child Wallerstein and Kelly selected as representative of those functioning moderately well was also involved in criminal activity in shoplifting and "petty" stealing from her school.[112] If the Wallerstein and Kelly sample had contained more children from lower socioeconomic backgrounds, violent crime would probably have been a greater part of the pattern.

Clear and substantial evidence that broken homes are a major cause of juvenile crime has been in the literature for many years. Sheldon Glueck and Eleanor Glueck published a scale based on over twenty years of research that predicted delinquency in boys with extremely high accuracy—an accuracy seldom found in social science.[113] Their scale, used in many studies, contained five dimensions, all evaluations of family life. These were father's discipline of the boy, father's affection for the boy, mother's supervision of the boy, mother's affection for the boy, and the overall cohesiveness of the family.[114] Divorce becomes a significant contributor on this scale to the likelihood of delinquency.

A recent study by Harriett Wilson confirms the Gluecks' thesis in a contemporary British environment and points to the role of the father in reducing the likelihood of criminal activity in his sons.[115] The study examined boys growing up in both inner city and suburban areas. It correlated juvenile delinquency with parental strictness, social handicap, and parental criminality. Parental strictness was measured by such factors as whether a child was required to be in at a certain time

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111 *See id* at 211.
112. *See id* at 213.
113 *See* S. GLUECK & E GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950).
114. *See id* at 261.
115 *See* Wilson, *Parental Supervision A Neglected Aspect of Delinquency*, BRITISH JOURNAL OF CRIMINOLOGY 203 (1980)

and whether his mother could find him when he was not at home.[116] Wilson summarizes her findings as follows:

> [T]he delinquent rate in lax families is over seven times that in strict families; the rate in severely socially handicapped families is just under three times that in families with low social handicap; and the rate in families with a police record of parental criminality is just under twice that in families with no police record. One thus concludes that supervision is the most important single factor in determining juvenile delinquency. . . .[117]

Wilson's findings link divorce to delinquency, since close supervision is very difficult in a single parent family. As Hetherington notes:

> The single mother may confront specific problems of authority in discipline. Children view fathers as more powerful and threatening than mothers, and when undesirable behavior occurs, the father can terminate it more readily than the mother can.[118]

In large families without a father, lax supervision of boys becomes very probable, and with it the tendency toward criminality increases substantially.[119]

II. Protection of the Child's Interests

As we have seen, substantial empirical evidence from the field of psychology now establishes that parental separation has substantial, long-term negative effects on children. These effects arise from the anxiety a child experiences when he or she is separated from a parent, from the conflict between parents that often occurs when they separate, and from the reduced influence of the noncustodial parent, generally the father, on the child.

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116. *See id.* at 212.

117. *Id.* at 229-30.

118. Hetherington, *supra* note 95 at 72 (citation omitted).

119. Other studies also link parental separation and divorce with criminal activity on the part of children.

D. H. Russell, in a study of 24 juvenile murderers, many of whom had shown no previous sign of turmoil before the crime, found that all of them were involved in a dependent maternal relationship, with a lack of countering support from the father; in short, there was severe conflict over passivity and aggression, in the context of a weak or absent father. *See* Russell *Ingredients of Juvenile Murder*, INTERNATIONAL JOURNAL OF OFFENDER THERAPY 65 (1979)

The lack of a father in the home may be a greater contributing factor to long-term problems with delinquency among girls than among boys. T. P. Monahan reported in 1957 the results of research into the backgrounds of over 44,000 delinquents. He states, "Of the white female recidivists, 68.6% came from broken homes v. 41.4% of the males; of the black female recidivists, 80.2% came from broken homes v. 62.2% of the males." Monahan, *Family Status and the Delinquent Child: A Reappraisal and Some New Findings*, cited in J. Cortés, *supra* note 108, at 221.

Laws related to parental separation and divorce should be evaluated in light of the effects of separation and divorce on children. The law should distinguish between families in which there are children and families without children, and the interests of the children should be protected. We will now evaluate several proposals in the parental separation and divorce area in respect to the interests of children.

A. *Discouraging Divorce*

The obvious question raised by the difficulties children suffer when parents separate is whether discouraging divorce would benefit children. Wallerstein and Kelly give us the perspective of the children on the single-parent family *vis a vis* the intact family of an unhappy marriage:

> Only a few of the children in our study thought their parents were happily married, yet the overwhelming majority preferred the unhappy marriage to the divorce. . . . Many of the children, despite the unhappiness of their parents, were in fact relatively happy and considered their situation neither better nor worse than that of other families around them. They would, in fact, have been content to hobble along. The divorce was a bolt of lightning that struck them when they had not even been aware of the existence of a storm.[120]

E. Mavis Hetherington states, "the needs of children and parents are not always congruent—a solution that contributes to the well-being of one may have disastrous outcomes for the other."[121] As an example, she cites the findings of her study of mothers, fathers and preschool children in the two years following divorce.[122] She states:

> A group of mothers were identified and labeled as egocentric, self-fulfilling mothers. They were among the women who recovered most rapidly from any adverse effects of divorce and who, by one year after divorce, reported that their current life was vastly preferable to their married life before the divorce. They viewed their current separation as happy, satisfying, and stimulating, and the initial increases in state anxiety, feelings of external control, and low self-esteem, which were found in many women during the first year after divorce, dissipated rapidly in this group. These women had returned to school, begun to work, become involved with community activities, or pursued social activities and emotional involvements at a frenetic pace. However, they had gained their satisfaction at the expense of the well being of their children. The children of these self-fulfilling mothers had the most frequent, intense and enduring signs of emotional disturbance and behavior problems, both in the home and in the

120. WALLERSTEIN, *supra* note 1, at 10-11.
121. Hetherington, *supra* note 107, at 34.
122. *See* Hetherington, *supra* note 95.

> school. This was in part because, in their relentless egocentric pursuit of self-gratification and search for a resolution of their own emotional problems, they spent little time with their children and often did not recognize, or were unresponsive to, their children's needs and distress.[123]

In some cases, however, parental separation and divorce is probably best for the children in the long run. As noted above,[124] the Hetherington study found that in families where there was intense continuing marital dissatisfaction and conflict between parents, children initially suffered detriment from parental separation, but where parental conflict was avoided following separation, the children were doing better two years following the separation than children who remained in intact but high-conflict families.

The Wallerstein and Kelly study gives us some help in determining the number of divorces within families that fall into this high-conflict category. They found that one-third of the divorces they studied occurred between parents who had unhappy marriages that were unlikely to get better.[125] Years of visible unhappiness made divorce in such instances an apparently "rational solution."[126] In such cases children find divorce relatively easy to understand and accept. The divorces between parents described by Hetherington as having "intense continuing marital dissatisfaction and conflict,"[127] would fall within this category.

To summarize, divorce is probably beneficial to children in the long run, if there has been intense continuing marital dissatisfaction and conflict between the parents during the marriage and the parents are able to avoid high conflict following divorce. For the substantial number of children of divorce who do not come from families in which there is intense continuing marital dissatisfaction and conflict, parental separation and divorce is generally more destructive than maintaining the intact family.

Until recently, the law in Western countries made it very difficult for couples to divorce.[128] Typical of the attitudes expressed by the

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123. Hetherington, *supra* note 107, at 34-35.
124. *See* text *supra* accompanying note 99.
125. *See* WALLERSTEIN, *supra* note 95, at 74.
126. *See id.* at 18.
127. Hetherington, *supra* note 95, at 74.
128. Generally, divorce was granted, if at all, only where the party requesting the divorce could establish that the other party had committed acts deemed by the law to give the wronged party sufficient grounds for divorce. In the United States, the grounds for divorce varied substantially from state to state, but generally included adultery, cruelty, desertion, and conviction of certain crimes. Divorce was granted only to the party who was without fault.

courts toward divorce is the following language of the Supreme Court of Virginia in 1911, citing an often-quoted English case:

> In this age, when divorces are so frequently sought, and, in some jurisdictions, so readily obtained for wholly insufficient cause, we cannot too strongly commend the language of Sir William Scott, in *Evans v. Evans*, 1 Hagg. C. R. 35: "When people understand that they *must* live together, except for a few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching duties which it imposes."[129]

The trend in recent years has been toward prompt, no-fault divorce at the request of either party. In 1970, what has been called the first *comprehensive* no-fault statute executed in the United States went into effect in California.[130] It established "irreconcilable differences, which have caused the irremediable breakdown of the marriage" and incurable insanity as the only grounds for divorce.[131] Iowa followed soon thereafter with a similar statute.[132]

In 1970 a committee of the National Conference of Commissioners of Uniform State Laws proposed the Uniform Marriage and Divorce Act (UMDA).[133] Under the UMDA, divorce will be granted if a court finds that a marriage is "irretrievably broken." This finding must be supported by evidence that the parties have lived separate and apart for more than 180 days next preceding commencement of the proceeding *or* that "there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage."[134] All defenses to divorce are abolished.[135] If one of the parties denies that

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Under several doctrines which were developed, courts refused to grant divorce even where fault grounds for divorce existed. Under the doctrine of recrimination, a divorce was denied where both parties were at fault. Where the parties cooperated to get the divorce, it was denied on the ground of collusion. If the party seeking the divorce enticed the other party to commit a fault ground, the divorce was denied on the ground of connivance, and where the innocent spouse had forgiven the other partner for his or her offense, the divorce was denied on the ground of condonation. A few states permitted divorce on the ground of incompatibility, but within those states the courts at times treated incompatibility as a fault ground for divorce and required strict proof of deep irretrievable conflict. Within a few other states divorce was allowed based on the parties' living separate and apart for a period of time, without regard to fault. *See generally* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 35-63 (1966).

129. Haynor v. Haynor, 112 Va. 123, 127, 70 S.E. 531, 532 (1911).

130. *See* Zuckman, *The ABA Family Law Section v. the NCCUSL: Alienation, Separation and Forced Reconciliation Over the Uniform Marriage and Divorce Act*, 24 CATH. U. L. REV. 61, 61 (1974).

131. *See* CAL. CIV. CODE § 4000-5138 (West 1970).

132. *See* IOWA CODE ANN. § 598.1.34 (West 1974).

133. *See* Foster, *Divorce Reform and the Uniform Act*, 7 FAM. L.Q. 179, 187 (1973).

134. MARRIAGE AND DIVORCE ACT § 302(2), 9A U L.A. 91 (1979).

135. *See id.* § 3 03(e).

the marriage is irretrievably broken, the court may continue the case for from thirty to sixty days and suggest that the parties seek counseling. The court may order a conciliation conference.[136]

When viewed realistically, Section 302(2)(ii) of the UMDA permits divorce on demand of either party. A party desiring a divorce need only establish that "there is serious marital discord," which he or she could create, and that the discord has "adversely affected" his or her attitude toward the marriage.[137] If the responding party denies that there is irretrievable breakdown, presumably the petitioning party could create more "serious marital discord" to establish his or her right to a prompt divorce.

The UMDA has been adopted by Arizona, Colorado, Georgia, Illinois, Kentucky, Minnesota, Montana and Washington.[138] An additional twenty-four states will grant a divorce based on irretrievable breakdown.[139] Nineteen states and the District of Columbia will grant divorce based on a period of separation ranging from six months to five years.[140] Some states that will grant divorce based on a period of separation will also grant divorce based on irretrievable breakdown.[141] South Dakota is the only state that still requires proof of fault grounds before a divorce will be granted.[142]

The trend in the law toward prompt, no-fault divorce at the request of either spouse has greatly reduced the barriers that previously faced those who desired divorce. In addition to the removal of the legal barriers, the change in laws has influenced the attitudes of people toward divorce. As Mary Ann Glendon has said:

> [I]n a legal system like that of the United States we cannot say that a change from what has been rather extensive legal regulation of marriage and family matters to "delegalization" is really neutral, or that the change in the law has no effect on the mores. In an indefinable but nonetheless real way, much of our law performs educational and hortatory, as well as legal, functions. In a society where there are few sources of common inspiration, the law in some instances can take on a sacred character, becoming what the sociologist Robert Bellah calls a "civil religion." . . . In such a society, laws like the Washington law permitting unilateral divorce on demand have a certain, albeit unquantifiable moral significance. We must face the fact that in our society the law is not a

136. *See id.* § 305.
137. *See id.* § 302(2).
138. *See* FAM. L. REP. (BNA) 400.
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*

completely unimportant normative force. It interacts with and reacts upon social change [143]

A large portion of children whose parents divorce under no-fault divorce laws are worse off than they would have been had their parents remained together. On the other hand, where the new laws enable parents to dissolve marriages in which there has been intense continuing marital dissatisfaction and conflict, they have probably been beneficial to the children. Although the requirement that one of the parties prove that the other was at fault in the break-up of the marriage kept some families together, the removal of that requirement has in many cases reduced the conflict which arises where there is a divorce. As we have seen, such parental conflict is especially destructive to children.[144]

We propose that where husband and wife have living minor children, no-fault divorce be granted only after a year's waiting period following the separation of the parents. Such a provision would permit divorce, without the conflict generated by the requirement that fault be established, but would, to some extent, discourage divorce.[145]

Such a waiting period would discourage divorce in three ways. It would do so first by presenting some barrier to one considering divorce. All marriages go through difficult times. Sometimes today the parties stick together and work through the hard times and frequently develop a stronger marriage. In an earlier day the law in many cases would not permit divorce and thereby strongly encouraged marriage partners to adjust to one another. We propose that the law maintain at least a slight barrier to divorce in order to encourage partners to make adjustments to married life which would be so beneficial to their children.

Secondly, in requiring such a waiting period, the state would demonstrate that it disapproves of divorce where children are involved.

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143 Glendon, *Marriage and the State The Withering Away of Marriage*, 62 VA L REV 663, 719 (1976) (citation omitted)

144 *See supra* notes 95 to 104 and accompanying text

145 We are aware that our conclusion about the role of law in discouraging divorce differs with that of Wallerstein and Kelly They state

> We began our work with the conviction that divorce should remain a readily available option to adults who are locked into an unhappy marriage Our findings, although somewhat graver than expected, have not changed our conviction Wallerstein and Kelly, *California s Children of Divorce*, PSYCHOLOGY TODAY 67, 76, January, 1980

To the extent that society's mores and attitudes are influenced by the law, a year's waiting period will discourage divorce between parents of minor children.

Thirdly, such a waiting period would afford the parents a greater opportunity to reconsider the decision to divorce. They will have the opportunity to see the effects of their separation on their children. Moreover, a year's waiting period will give them time to have a more objective view of any incident that may have caused the breakup.

Requiring a one-year waiting period would be especially helpful where divorce is what Wallerstein and Kelly refer to as a "stress-related response."[146] This type of divorce relates to no clear marital unhappiness but results from some outside stressful occurrence to one of the partners.[147] Such an occurrence can so disturb a person that a previously satisfactory marriage is suddenly rejected, and the person breaks off the relationship and pushes for divorce in an attempt to escape depression. These divorces resulting from outside stress are notably hard for children to understand and bring a special burden to them, for the whole dissolution of the family makes no sense to them. Wallerstein and Kelly give an illuminating case history:

> Mrs. K. filed for divorce shortly after her mother died. Her husband, a gentle, devoted family man, was startled and begged her to change her mind, or at least to permit him to remain within the family home, since he had no place to go. The children cried and implored their mother to change her mind. Her oldest child tried to comfort her and spent many evenings with the sorrowing woman, trying gently to cheer her. Four years later, Mrs. K. told us, "I wish I could marry him again. I was upset. My mother had died, and I felt that he wasn't sympathetic, and I filed for divorce. It was a terrible mistake, but there is nothing to do now. I have ruined the lives of four people."[148]

In a situation like Mrs. K.'s, a year's waiting period may give the spouse who is initiating the divorce the time properly to evaluate the relationship between the stress and the depression that he or she is experiencing. The value of the marriage to parents and children may be recognized, and the parties may be reconciled.[149]

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146. WALLERSTEIN, *supra*, note 1 at 19.

147. *See id.*

148. *Id.* at 20.

149. In some cases, the year's waiting period should be coupled with counseling for the parents. Where divorce is a stress-related response, the parent who initiates the separation may need counseling to deal with the underlying stress. Under Section 305 of the UMDA, where one party denies that a marriage is irretrievably broken, the court may continue the case for 30 to 60 days and suggest that the parties seek counseling. *See* UMDA *supra* note 134, at 305. We pro-

B. *The Question of Independent Representation for the Child*

In recent years many writers have proposed that an attorney be appointed to represent the interests of children in contested custody cases.[150] Goldstein, Freud and Solnit advocate the appointment of legal counsel for the child in contested custody cases. They state in *Beyond the Best Interests of the Child:*

> The law presumes that a child's parents are generally best suited to represent and safeguard his interests. That presumption, however, should not prevail, as it does, once the child's placement becomes the subject of a dispute between parents which they are unable to resolve without resort to the courts, as in a divorce or separation proceeding.[151]

Goldstein, Freud and Solnit state further in *Before the Best Interests of the Child:*

> By failing to agree on a disposition [as to custody], separating parents waive their claim to parental autonomy and thereby their right to be the exclusive representatives of their child's interests. The child then requires representation independent of his parents to assure that his interests are treated as paramount in determining who shall have custody.[152]

Theoretically, counsel for the child has been justified for two purposes, that of factfinder and that of advocate for the interests of the child.[153] However, when child custody is litigated, the child generally does not need legal counsel for either of these purposes. The role of factfinder is generally adequately filled by parents and their counsel. Each presents the good points of his or her side and the shortcomings of the other. Where the judge detects that the parties are avoiding facts that both would rather cover up, the judge can inquire into such matters.

If the judge believes that additional information is needed to make an informed decision in a given case, the judge should have the au-

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pose that the judge have authority to order counseling at any time either party petitions for divorce.

150. *See* Note, *Lawyering for the Child Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, at 1127 n.7 (1978) (citing sources) [hereinafter cited as *Lawyering for the Child*].

151. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 65-66 (1973).

152. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 114 (1979).

153. *See Lawyering for the Child, supra* note 150, at 1138-42. That note found that in practice, counsel for children generally serves also as mediator between the parents, a role which is ignored by the proposed theoretical models. Mediation of such disputes is discussed *infra* beginning at text accompanying note 185. In that discussion, we advocate that mediation of child custody disputes be required. If no formal mediation structure is established, counsel for the child is justified in many cases for the purpose of mediating the dispute.

thority to appoint others to assist him or her in fact finding, but additional fact finding will generally require someone with skills *other* than those of a lawyer. The situation might justify the appointment of a psychologist or psychiatrist to evaluate the child or the parents, or it might justify the appointment of a social worker to do a home study. If the judge feels that an interview with the child in the child's home or elsewhere by someone is justified, the judge should have the authority to appoint a social worker or one of the court personnel for that purpose. Most of the areas in which it may be helpful for a judge to have aid in fact investigation are not areas in which lawyers are trained, and courts should spend resources on those factfinders who have skills that can better assist the judge in making the decision.

Appearance of an attorney in the role of the child's advocate should also be unnecessary in a litigated custody case, where it is the responsibility of the judge to protect the interests of the child. As Judge Cardozo stated:

> [The judge in a child custody case] acts as parens patriae to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent," and make provision for the child accordingly. *Finlay v. Finlay*, 240 N.Y. 429, 433, 148 N.E. 624, 625 (1925) (citation omitted).

The primary goal of child custody cases is to determine what promotes the best interests of the child. The issue which should be foremost in the judge's mind and which counsel for the parents should address is what best serves the child's interests.

If an attorney serves as advocate for the child, that attorney will develop an opinion on the ultimate issue, i.e., what is in the best interests of the child, and then advocate that opinion. Counsel serves merely as an advisor to the judge as to the issue the judge must decide. In some cases, where the decision turns on complicated psychological questions, the judge should have the authority to appoint an expert, such as a child psychologist or psychiatrist, to give advice. The appointment of a lawyer, who, perhaps like the judge, generally has limited skills in psychology, is unjustified in such a case.[154]

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154. We will argue *infra* at note 182 that counsel for the child would be helpful in uncontested cases immediately upon the separation of the parents, but that the expense of such a proposal is prohibitive. We advocate the appointment of counsel for the child under the limited circumstances described *infra* at text accompanying note 184.

C. *Protecting the Child's Interest in Substantial Contact with Both Parents*

As we have seen, when parents separate, a child suffers substantial short- and long-term losses as a result of the loss of contact with the absent parent. We have cited the finding of Wallerstein and Kelly that children have a strong desire for more time with the noncustodial parent, even when they have substantially more visitation than is generally ordered.[155] On the other hand, the Wallerstein and Kelly study found that visitation is often the occasion for parental conflict,[156] which the Hetherington study[157] and the Jacobson study[158] found to be so destructive to children.

Comparing the evidence of the negative impact of visitation with the evidence of its positive impact, we conclude that substantial contact with both parents should be encouraged in three ways. First, there should be joint custody, under which parents share time with the children and responsibilities for them, where the parents request it. Second, where the parties cannot agree on joint custody, the courts should order substantial amounts of visitation with the noncustodial parent. Third, children should be entitled to established minimum amounts of child visitation and child support[159] when their parents separate, and parents should not be permitted to agree to less than these minimum amounts, unless otherwise ordered by the court.

Goldstein, Freud and Solnit take the position that a child should be placed in and remain in the custody of one parent, who should have control over all aspects of the child's life, including the extent of the visitation, if any, which the child has with the noncustodial parent.[160] This position is justified on grounds that the visitations will serve as the source of discontinuity; loyalty conflicts will develop as a result of the visitation; the visited parent will have "little opportunity to serve as a true object for love, trust, and identification"; and the

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155 *See* text *supra* accompanying notes 54 to 57

156 One-third of the children in the Wallerstein and Kelly study were consistently exposed to intense anger at visiting time *See* WALLERSTEIN, *supra* note 1, at 125

157. *See supra* note 95 and accompanying text

158 *See supra* note 102 and accompanying text

159 Though the establishment of minimum amounts of child support will help the child's financial security, our primary reason for supporting this, as argued *infra* at text following note 183, is that the payment of support has a positive effect on the exercise of visitation

160 *See* J GOLDSTEIN, A FREUD & A SOLNIT, *supra* note 151, at 38

ongoing relationship between the custodial parent and the child will be endangered.[161]

The Wallerstein and Kelly study provides substantial evidence contradicting the Goldstein, Freud and Solnit position that a noncustodial parent will have difficulty in serving as an object for love, trust and identification for the child. Wallerstein and Kelly found that the children studied not only greatly desired substantial visitation, but that those children who did best under the deprivation of divorce were those whose visitation with the noncustodial parent was regular and dependable.[162]

In addition to her study of the effects of parental conflict on children after divorce,[163] Doris Jacobson studied the effects of parental visitation on a child.[164] She compared the results of the Louisville Behavior Checklist with those of the "Time Spent Form" which she developed.[165] The Time Spent Form measured the time spent by each parent in the presence of the child during a two-week period prior to separation and during a two-week period following separation.[166] The custodial parent was the mother and the visiting parent was the father in all but one of the thirty Jacobson families.[167] The parents shared joint custody in that family.[168] The Jacobson study found that the greater the loss of time with the father, the higher the maladjustment of the child.[169] No significant association was found between the child's adjustment and time lost with the mother.[170]

On the basis of the findings of the Wallerstein and Kelly study and the Jacobson study, we believe the law should seek to protect the child's interest in maintaining a close relationship with both parents. The law should do this by (1) awarding joint custody where the

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161. *Id.*
162. WALLERSTEIN, *supra* note 1, at 215.
163. *See* Jacobson, *supra* note 102.
164. *See* Jacobson, *The Impact of Marital Separation/Divorce on Children: I. Parent-Child Separation and Child Adjustment*, 1 J. DIVORCE 341 (1978).
165. *See id.* at 348-49.
166. *See id.* at 348. The study found that during the two-week period prior to separation, the mothers spent an average of 94.94 hours with the children and after separation an average of 73.30 hours. The fathers spent an average of 53.6 hours with the children during the two-week period prior to separation and an average of 20.12 hours with them after separation. *See id.* at 351.
167. *See id.* at 347, 350.
168. *See id.* at 350.
169. *See id.* at 356.
170. *See id.*

parents request it,[171] (2) ordering substantial amounts of visitation in contested cases, and (3) establishing minimum amounts of child visitation and child support when parents separate and there is no court order.

A parent will take more interest in a child if he or she not only has substantial time with the child, but also has decision-making responsibility about major aspects of the child's life, as is generally the case where parents share joint custody. Wallerstein and Kelly found that without such responsibility, "many noncustodial parents withdraw from their children in grief and frustration."[172]

These authors take the position that the least detrimental situation for children of separated parents is one in which the parents can work together in a joint custody arrangement under which they share legal responsibilities for the children.[173] Such an arrangement generally will not result in the parents having equal time with the children. Typically under joint custody arrangements, parents agree that the children will live with the mother on a day-to-day basis, but that the father will have more time with the children than under traditional custody orders.[174]

Joint custody arrangements are not always, however, in the best interests of the children. Judith Wallerstein reports a situation in which the parents agreed that the child would spend alternate years with each parent.[175] Courts should carefully review unusual arrangements like this and should disapprove them if they are not in the best interests of the children. As more is learned about the effects of various joint custody arrangements on the lives of children, the law should create presumptions in favor of joint custody arrangements that have positive effects on children and should require careful judicial scru-

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171. California in 1980 passed legislation that creates a statutory presumption that joint custody is in the best interests of the children when both parents are able to agree to it. *See* CAL. CIV. CODE § 4600 (Supp. 1982). As will be noted *infra* at text beginning at text accompanying note 203, we advocate mediation of custody visitation disputes, because parents that mediate such disputes agree to joint custody much more often than those who reach agreement within the traditional adversary system

172. WALLERSTEIN, *supra* note 1, at 310.

173. *See id.* at 310-11.

174. *See* Pearson and Thoennes, *Divorce Mediation: Strengths and Weaknesses Over Time*, ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 51, 61 (H. Davidson, L. Ray, and R. Horowitz eds. 1982) (hereinafter cited as Pearson).

175. Address by Judith S. Wallerstein, *Developing Mediation Models for Divorcing Families with Children* to Association of Family and Conciliation Courts Conference, San Francisco, California, May 19-22, 1982, *citing* Reno Evening Gazette, February 24, 1982.

tiny of other arrangements. When parents are unable to agree on joint legal custody, custody should be given to one parent.[176] To impose joint custody where parents are unable to agree would generally give rise to substantial conflict that would be detrimental to the children.

When custody is granted to one parent, courts should generally order more visitation with the noncustodial parent than is presently being ordered.[177] Such visitation should include not only weekend time but time during the week. An increase in the amount of visitation ordered by courts in litigated cases will lead to more visitation in cases which are not litigated, because court decisions are the basis for nonlitigated parental decisions in cases that are not litigated.[178] Parents look to their lawyers, who look to the courts for guidance.[179]

In addition to approving joint legal custody when parents agree, and awarding substantial visitation rights to noncustodial parents who seek it, the law should provide specific rights of visitation to the noncustodial parent, and should give specific rights of child support to the custodial parent, in the absence of a court order regulating those matters. Such provisions would provide relief during negotiation and litigation of those issues, and would also protect the children's interests in other situations where parents are separated and there is no visitation or support order.

The custodial parent often has such a resentment toward the other parent that he or she wants to prevent the child's contact with that parent. The custodial parent may honestly feel that it is in the child's best interests to keep the child from the influences of the former partner. Also, as noted previously, Wallerstein and Kelly found that two-thirds of the mothers and four-fifths of the fathers in their study were put under stress by visits.[180]

It is, of course, in the financial interest of the noncustodial parent to avoid the payment of child support. Moreover, the noncustodial parent often resents giving money to the custodial parent for any

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176. As we argue *infra* at note 181, a presumption should be established that it is in the best interests of the child that his custody be given to the primary caretaker.

177. Wallerstein and Kelly found that when visitation was set by the courts, it was generally set at twice monthly overnight or weekend visits. *See* WALLERSTEIN, *supra* note 1 at 133.

178. *See* Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

179. *See* WALLERSTEIN, *supra* note 1 at 132-33.

180. *See* WALLERSTEIN, *supra* note 1 at 125; *see also* text *supra* accompanying note 25.

reason, and may feel that the custodial parent does not spend support money for the things that best benefit the child.

When the custodial parent opposes the noncustodial parent's visitation with the child, the custodial parent will often sacrifice child support in return for the noncustodial parent's having either no visitation or limited visitation.[181] This arrangement may find expression in a formal separation agreement between the parties, or it may arise informally when the custodial parent fails to seek child support for fear the noncustodial parent will then seek visitation. In such a situation, the custodial parent is happy with limited or nonexistent visitation, and the noncustodial parent is happy with limited or nonexistent child support. However, the child is hurt in both respects. The child has less financial security and is deprived of visitation with the noncustodial parent.[182]

We propose that where one parent serves as the primary, day-to-

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181. In other situations, the custodial parent may be subject to unfair pressures to accept no child support or unreasonably low child support to the detriment of the child. Generally it is the parent who has spent the most time caring for the child who has developed the closest emotional bond with the child and most wants custody. This parent is subject to threats from the other parent, whether real or feigned, that he or she will seek custody if the primary caretaker seeks child support. The primary caretaker is in a weak bargaining position because he or she will give in on many issues to insure that he or she will retain custody. The stronger the primary caretaker's emotional bond to the child, the weaker the bargaining position. The custodial parent may fail to pursue child support for fear the other parent will seek custody.

In a most interesting article which points out the effects of the rules of law concerning divorce on the negotiation of separation agreements, Robert H. Mnookin and Lewis Kornhauser point out that the switch in most states from having a preference for the mother as custodian to placing the parents on an equal footing has placed the mother, who generally becomes the custodian, in a weaker bargaining position vis-a-vis the other issues arising when parents separate. *See* Mnookin and Kornhauser, *supra* note 178, at 177-78. In light of this finding and of Bowlby's findings concerning the importance of the child's maintaining a regular relationship with his primary attachment figure, there should be a presumption that a child's custody be placed with his primary caretaker. *See* ATTACHMENT, *supra* note 70, at 304-6. *See also supra* notes 69 to 94 and accompanying text. It will not be easy in all cases to determine which parent is the primary caretaker but such a presumption would properly establish the question of who is the child's primary caretaker as the most important factor in a custody determination.

182. Those who advocate that counsel be appointed for the child in custody proceedings have generally advocated that counsel be appointed in disputed cases when one of the parents initiates a custody proceeding. Appointment of counsel for the child at that stage would not prevent the sort of problem here described. As noted earlier, generally the interests of the child are adequately protected by the judge and counsel for the parties where custody matters are litigated. *See* text *supra* following text accompanying note 117. Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917, 948 (1976), argues that counsel for the child should be provided for undisputed cases. That note does not designate a time at which such counsel should be appointed.

The point at which children most need protection of their interests is when the parents separate and do not contest custody or related matters. It would be ideal to have an attorney appointed to represent the interests of the child immediately upon the separation of the parties. The attorney could make sure that visitation and child support are at the appropriate level. If visitation is not being exercised by the noncustodial parent at an appropriate level because of

day caretaker of a child, minimum standards of child visitation and child support be established by law, to go into effect immediately upon the separation of the parents. For either parent to fail to abide by at least the minimum standards of support and visitation, without court approval, would be a violation of the law.

A proper minimum standard for child visitation would be an average of one day per week for children over one year of age. The law should establish guidelines as to timing of visits, which the parties could vary by agreement. For example, the law could establish that unless the parents agree otherwise, on alternate weekends the noncustodial parent would pick up the children from the home of the custodial parent at 6:00 P.M. on Friday and return them at 6:00 P.M. on Sunday. If either party felt that the circumstances justified other visitation arrangements, and was unable to negotiate other arrangements, he or she could take the matter to court. Pending a court decision, the child and the noncustodial parent would be entitled to visitation under the schedule established by statute.

The law should also establish minimum standards of child support, based on the number of children and the after-tax income of the noncustodial parent. An amount of child support lower than the minimum standards would require court approval. An example of the type of minimum standards which should be established are those under the schedule of child support payments that goes into effect under court order pending litigation in Seattle, Washington. That schedule is based on cost-of-living information from the Bureau of Labor Statistics. The established percentages of the noncustodial parent's after-tax income (assuming the standard deduction) are 24 percent for one child, 35 percent for two children, 42 percent for three children and 48 percent for four children.[183]

A minimum standard schedule of child support would not establish the appropriate long-term amount of support in all cases. It would establish the minimum support required when the parties separate and it would not affect the factors a judge would consider if

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the emotional difficulties that the noncustodial parent feels at visitation, counsel could coax the noncustodial spouse to exercise such visitation, pointing out the child's need for such visitation. However, the costs of counsel in all such situations would make such a provision unfeasible.

183. *New Child Support Schedule*, Seattle-King County Association Bar Bulletin (December 1974).

the matter of child support were taken before him or her. Of course, what the judge would order is the primary question the parties would consider when reaching settlement on the issue of child support. If factors should warrant a variation from the schedule's minimum amount, e.g., a great disparity in the parent's property or a much greater earning capacity of the noncustodial spouse than his or her earnings reflect, those factors would play the same role in reaching a child support figure that they now play. The only difference would be that court approval would be required for an amount lower than the minimum standard and at least the minimum would be required pending any court hearing.

Not only would the minimum support requirement aid the financial situation of the child, in many situations it would also avoid problems with visitation. If a parent knew that the failure to make the appropriate child support payment were a violation of law that would have consequences later, he would be less likely to fail to make such payments than if his only fear were that the custodial parent would withhold visitation. Likewise, because of the noncustodial parent's continual payment of support, the custodial parent would be less likely to deny visitation.

Minimum standards of visitation and support should be enforced through several means. First, if the noncustodial parent failed to pay the established child support, an arrearage should accrue, which could be enforced like any debt. Second, if either party were found unreasonably to have caused the violation of the minimum standard, he or she should be required to pay the resulting attorney's fees of the other party. Finally, the law should require that the divorce petition and responsive pleading contain sworn statements by each of the parents showing (1) the amount of visitation the noncustodial parent has exercised since the separation, (2) the income of the noncustodial parent, and (3) the amount of child support that has been paid or received. If the noncustodial parent has not paid the minimum child support payment, future payments and payments on the arrearage should be paid through the court. If the minimum child visitation has not been exercised in an uncontested case, we propose that an attorney or some other responsible person be appointed to investigate the situation, to review the terms of any separation agreement, and to represent the child's interests concerning that agreement. If counsel for the child agrees that less visitation than the minimum standard is

in the best interests of the child, he or she could join in a motion for court approval of more limited visitation. In such a situation, the law should require that the parents pay the appointed attorney's fee.[184]

D. *Mediation of Domestic Disputes*

Much has been written in recent years about the mediation of domestic disputes.[185] We will examine evidence of the effect of mediation on conflict between parents, and of the kinds of custody agreements that are generally reached by mediating couples. We will conclude that couples should be required to attempt to mediate custody and visitation disputes prior to litigation.[186]

Under mediation, the parties meet with a third party, the mediator, who:

> encourages the disputants to find a mutually agreeable settlement by helping them to identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, explore new areas of compromise, and ultimately negotiate an agreement [187]

The most extensive empirical study comparing mediation with the traditional adversary system in custody disputes is that of Jessica

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184 This is the one situation in which we draw an exception to our general rule that appointment of counsel for the child is not justified As noted *supra* at text accompanying notes 153 to 154, we believe that generally the judge and counsel for the respective parents represent adequately the child s interests in contested cases As noted in *supra* at note 140, a child is more likely to need counsel where parents separate and do not contest custody or visitation Where such matters are not contested, the child is more likely to be deprived of visitation and support Although appointing counsel in all uncontested cases would not be practical because of the expense, where visitation has not been exercised at the minimum level the parents have indicated their lack of concern for this need of the child, and the oversight of an attorney is justified

185 *See e g* ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION *supra* note 174 and sources cited therein at 609-12

186 Mediation of such matters was mandated by California in 1980, *see* CAL CIV CODE § 4607 (West 1982) and Florida in 1982 *see* FLA S B 439 (Effective July 1, 1982) Under California law when a pleading indicates that custody or visitation is at issue, whether by initial petition or petition for modification, the disputed issue is set for mediation with court personnel *See* CAL CIV CODE § 4607(a) (West 1982) The California Code States

> The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children s close and continuing contact with both parents after the marriage is dissolved *Id*

The mediation proceedings are confidential *See id* § 4607(c) The mediator may exclude counsel from the sessions and may interview the child or children *See id* § 4607(d) Provision is made for payment of the expenses required by such mediation by raising divorce filing fees and the fees for marriage licenses and certificates CAL GOV CODE § 26840 3 (West 1982) If the parties are unable to reach an agreement of the disputed issues in mediation, the matter is handled under the regular adversary procedures

187 Pearson, *supra* note 173, at 53

Pearson and Nancy Thoennes.[188] Under that study, divorcing couples were randomly assigned to mediation and control groups. Each of the members of the control group proceeded through the regular adversary procedure, while those in the mediation group were offered cost-free mediation services.[189] Half of the couples who were offered mediation services rejected them.[190] Interviews with the members of the control group were held (1) when a pleading initiating a custody or visitation dispute was filed, (2) soon after the court promulgated a final order, and (3) six to twelve months after the final order.[191] Couples who accepted mediation were assigned to trained male-female mediation teams of lawyers and mental health professionals, and were interviewed (1) before mediation, (2) immediately after mediation, (3) soon after the court promulgated a final order, and (4) six to twelve months after the final order.[192]

Fifty-eight percent of the couples who attempted mediation were able to reach agreement on the issues of custody and visitation during mediation, and of those who failed during mediation, 65 percent were able to reach agreement before they went to court.[193] Thus, a total of 80 percent of the couples accepting mediation produced their own custody and visitation agreement, either during or after mediation.[194] By contrast, only half of those in the control group and half of those in the group that chose not to accept mediation reached an agreement.[195]

At six to twelve months after the divorce, of those individuals who had successfully reached an agreement during mediation, a much smaller percentage had filed a motion to modify the court decree than the percentage in all other groups, and a substantially greater percentage reported their spouses in compliance with the court decree

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188 *See id* at 55-57

189 *See id* at 56

190 *See id*

191 *See id*

192 *See id* The Pearson and Thoennes article presents a short-term comparison of 125 mediation clients, 63 individuals in the adversarial control group and 95 individuals who rejected mediation, and a six- to twelve month term comparison of 92 mediation clients, 50 control individuals, 74 individuals who rejected mediation *See id* at 57

193 *See id* at 57-58

194 *See id* at 58

195 *See id* at 58, 72 The average time between the initiation of proceedings and the promulgation of final orders was less for the successful mediation group (8 5 months) than the control group (10 2 months), or the group that rejected mediation (10 9 months) but the group moved the slowest was the unsuccessful mediation group (14 2 months) *See id* at 61

than in the other groups.[196] The percentage of each group that reported filing motions to modify were:[197]

Successful mediation group 9
Unsuccessful mediation group 22
Control group 20
Group that rejected mediation 20

The percentage who reported that their spouse was in compliance were:[198]

Successful mediation group 59
Unsuccessful mediation group 30
Control group 30
Group that rejected mediation 37

The couples who were exposed to mediation chose some form of joint custody substantially more often than those in other groups. The percentage of those couples within each group agreeing to joint custody were:[199]

Successful mediation group 69
Unsuccessful mediation group 14
Control group 7
Group that rejected mediation 6

On the average, children whose parents were exposed to mediation saw the parent with whom they did not live on a day-to-day basis more often than did other children. Soon after the court decree, the average number of days per month with such parent for each group was as follows:[200]

Successful mediation group 7.7
Unsuccessful mediation group 5.5
Control Group 4.9
Group that rejected mediation 4.9

At six to twelve months following the court decree, the average number of days per month were:[201]

196. *See id.* at 59.
197. *See id.* at 73.
198. *See id.*
199. *See id.* at 72.
200. *See id.*
201. *See id.* at 73.

Successful mediation group	9.0
Unsuccessful mediation group	7.1
Control group	5.1
Group that rejected mediation	5.4

Children, therefore, generally benefit in several respects from the mediation of domestic disputes. First, and most importantly, mediation often reduces the amount of parental conflict to which the children are exposed. Mediation can provide a forum for parental conflict away from the children and, as the Pearson and Thoennes study indicates, under mediation parents are more likely to reach an agreement, they are more committed to the success of the resulting agreement, and less conflict arises from the agreement than under agreements reached and orders made under the traditional adversary process.[202]

Second, mediation benefits children because those parents who participate in mediation are more likely to decide to share joint custody and allow more visitation.[203] As noted previously,[204] we believe that joint custody generally is in the interest of children.

Third, when parents are able to negotiate a settlement through mediation, parental autonomy and privacy are preserved. It is important to the development of a child that he maintain a belief in the substantial knowledge and the strength of his parents. This belief is weakened when he knows or senses that the decisions concerning his future are out of the hands of his parents, and in the hands of attorneys and judges. A child will have a greater respect for his parents if he knows they have made the decisions concerning him.[205]

Finally, mediation is superior to litigation or negotiation by attorneys because parents know their children best and therefore are generally better able than a judge or the attorneys to reach an agreement tailored to the children's specific needs.[206]

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202 *See supra* notes 193 to 198 and accompanying text

203 *See supra* notes 199 to 201 and accompanying text

204 *See supra* text accompanying notes 171 to 175

205 In this regard, *see* J GOLDSTEIN, A FREUD & A SOLNIT, *supra* note 152 at 7-11

206 Of course, parents may reach agreements which will be to the parents' mutual advantage and to the disadvantage of the children For this reason, we believe that the previously proposed minimum standard requirements of visitation and support should apply to mediated agreements as well as to other agreements and that any variation should require court approval *See supra* text accompanying notes 180 to 184

III. Conclusion

This article has reviewed the negative effects of parental separation and divorce on children. In light of them, it has argued that the law should discourage divorce by requiring a one-year's separation prior to divorce. It has argued further that the law should attempt to reduce the negative effects of parental separation by giving judges authority to appoint experts in psychology and other fields to aid them in child custody decisions, by encouraging more contact between the child and the noncustodial parent, and by requiring mediation of child custody disputes.